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REDEFINING THE TERM "GUARD"

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HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 1018

TO AMEND THE NATIONAL LABOR RELATIONS ACT TO CLARIFY THE MEANING OF THE TERM "GUARD" FOR THE PURPOSE OF PERMITTING CERTAIN LABOR ORGANIZATIONS TO BE CERTIFIED BY THE NATIONAL LABOR RELATIONS BOARD AS REPRESENTATIVES OF EMPLOYEES OTHER THAN PLANT GUARDS

APRIL 24, 1986

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CONTENTS

STATEMENTS

THURSDAY, APRIL 24, 1986

Page

Armored Transportation Institute, prepared statement 254
Endresen, Mark C., chairman, research department, Western Conference of Teamsters; and James L. Medoff, professor of economics, Harvard University 5
  Prepared statement of Mr. Endresen 7
  Prepared statement of Mr. Medoff 10
Gregory, Gordon A., general counsel, international union, United Plant Guards Workers of America [UPGWA], accompanied by Jack Russell, administrative assistant to President McGahey; and James G. O'Hara, Washington counsel; and Richard W. Cordtz, international secretary treasurer, Service Employees International Union, AFL-CIO, accompanied by Peggy Connerton, chief economist 130
  Prepared statement of Mr. McGahey 132
  Prepared statement of Mr. Cordtz 146
Gorton, Hon. Slade, a U.S. Senator from the State of Washington 1
Liebman, Wilma B., staff attorney, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, accompanied by Edwin Hucke, president, Teamsters Local 725, Chicago, IL 27
  Prepared statement of Mr. Presser 30
Methvin, Eugene H., senior editor, Reader's Digest, and former member, President's Commission on Organized Crime 225
  Prepared statement (with attachments) 230
Miller, Edward B., Esq., former Chairman, National Labor Relations Board 19
  Prepared statement 22
Smith, Sterling, president, Stanley Smith Security, Inc., chairman, Committee of National Security Cos., Inc.; Herman J. Koehler III, owner, Coin Depot Corp.; Aviem Goldberg, counsel, Purolator Courier Corp.; and William L. Cole, consultant, Wells Fargo Armored Service Corp 153
  Prepared statement of Mr. Smith 155
  Prepared statement of Mr. Koehler 166
  Prepared statement of Mr. Labrada 185
  Prepared statement of Mr. Cole 205
Yost, David W., president, Metropolitan Armored Car, Inc.; Jeffrey W. Pagano, counsel, Brinks, Inc.; Max A. De Bernardo, manager of labor law, U.S. Chamber of Commerce; and Melvin E. Bailet, senior vice president, Mayne Nickless, Inc 62
  Prepared statement of Mr. Yost 64
  Prepared statement of Mr. Pagano 79
  Prepared statement of Mr. de Bernardo 85
  Prepared statement of Mr. Bailet 122

REDEFINING THE TERM "GUARD"

THURSDAY, APRIL 24, 1986

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee convened, pursuant to notice, at 9:33 a.m., in room SD-430, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles, Simon, and Wallop.

Also present: Senator Gorton.

Senator NICKLES. Good morning.

Today we will hear testimony on the appropriate status that should be conferred on nonplant guards under the Taft-Hartley Act, and Senator Gorton's bill, Senate bill 1018, which is cosponsored by 16 other Senators, which seeks to change the present status.

It is a rather contentious issue. We have a very crowded witness list, and we also have a heavy agenda, with expected votes later this morning.

I will request all of our witnesses to summarize their statements; they will be entered into the record in full. In addition, there may be additional questions submitted by either myself or other members of the committee at the conclusion of the hearing, and we will keep the record open for 2 weeks after today for that purpose.

Senator Gorton, we welcome you. I knew that you would be on time; you always are. I congratulate you for that, and I appreciate the interest you have shown in pushing this particular legislation. You have been a very strong advocate for these hearings and for the committee to consider your bill.

Please proceed.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR, FROM THE STATE OF WASHINGTON

Senator GORTON. Senator Nickles, I want to thank the subcommittee for holding this hearing. But to thank the subcommittee is rather bloodless; for these purposes, you are the subcommittee. I greatly appreciate your willingness to get into a controversial issue on my request and to give people on both sides of this issue an opportunity to be heard.

Senators Stevens, Sasser, and I introduced this bill last spring, and it currently has a total of 16 sponsors and cosponsors.

S. 1018 was introduced to amend the National Labor Relations Act to clarify the meaning of the term "guard", thus restoring the

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collective-bargaining rights of thousands of workers in the delivery and bailment service industries.

A letter from a Seattle constituent first made me aware of a series of expansionary National Labor Relations Board decisions. In recent years, the NLRB and some courts have labeled armored car drivers, couriers, and other bailees guards for labor relations purposes. As a result, employees in these fast growing service industries have been left without the legal right to the bargaining representative of their choice.

Enacted as part of the Taft-Hartley Act of 1947, section 9(b)(3) of the National Labor Relations Act prohibits the NLRB from taking certain actions. First, it may not find appropriate any bargaining unit that includes both guards and other employees.

Second, the NLRB may not certify a union as a bargaining representative for guards if the union is affiliated with any labor organization admitting employees other than guards. Congress provided this restriction to minimize the danger of divided loyalty that arises when plant guards are called upon to enforce the employer's rules against other employees or to maintain order on the premises during labor strife.

Unfortunately, the NLRB has seen fit to expand the definition of the term "guard" far beyond its original context. Ignoring the plain meaning of section 9(b)(3) and its legislative history, the NLRB first expanded the sections' prohibitions to include armored car drivers.

Next unarmed couriers were added to the list of those who were "guards" for 9(b)(3) purposes. In recent years the NLRB has indicated that service employees such as dressing room attendants, doorkeepers, hotel lobby attendants and hat check personnel were guards. The general reasoning for these decisions has been that these employees are "guards" because they safeguard the property of the employer's customers.

Let us be clear. The result in each of these cases was that employees were denied the freedom to choose their bargaining representative. This also has translated into a loss of wages and benefits. A recent decertification action by a major courier firm presents a good example of how workers are hurt by the NLRB's broad interpretation of 9(b)(3).

According to employees, shortly after decertifying a national union as bargaining representative for its workers, the courier firm slashed wages and benefits. Wages were cut from $8.12 per hour to $5.50 per hour. The company now refuses to pay overtime wages. Holidays were cut from 9 days to 6 days. Medical benefits were reduced by 20 percent. Seniority rights, funeral leave, enforcement of safety rules and the ability to have grievances processed were terminated.

The NLRB's definition of "guards" for 9(b)(3) purposes also is disturbing because of its potential for further mischief. What significant differences are there between the workers that now fall under the specter of 9(b)(3) and truckdrivers safeguarding valuable cargo? Is 9(b)(3) to reach U.S. Postal Service employees protecting and delivering the mail? Are not bellmen who carry bags up to the rooms of guests in hotels protecting the property of the employer's customers?

In fact, the NLRB's interpretation of the guard clause has strayed far from the clear intent of Congress in enacting section 9(b)(3). These employees are not "guards" within the meaning of section 9(b)(3); rather they are "bailees," temporarily safeguarding the property of the employer's customers while it is being transported.

As Chief Judge Bazelon stated in dissent from a recent DC Circuit Court decision upholding the NLRB's approach: "Section 9(b)(3) marks an extremely narrow exception to the National Labor Act's general policy of employee free choice."

In enacting this guard clause, Congress was concerned with preventing plant guards from joining a production workers union, thereby splitting their allegiance between the employer and the union. In particular, Congress feared that allowing such mixed union representation might result in guard employees refusing to cross a picket line of fellow unionist production workers, and thus failing to protect the plant during labor strife.

Throughout the 1947 debate on this issue, committees and members used the terms "guards" and "plant guards" interchangeably. The House report on the bill referred to the provision as directed to "plant policemen and guards (who) prevent disorders and report misconduct of employees and of unions and their members."

The key impetus for the guard clause was the plant guard's status as a representative of management. Plant guards occupy an adversary posture as against other employees, both in enforcing rules against employees and in maintaining order during labor strife.

Obviously, the purpose behind section 9(b)(3) should not be applied in the context of armored car drivers, express delivery workers, or hat check employees. The NLRB has gone far beyond its mandate from Congress in stretching the guard clause to include these workers.

The essence of national labor policy is the promotion of employee free choice. Congress adopted a narrow restriction on organizing rights, directed to the unique status of plant guards. The NLRB has expanded the exception beyond that context, despite the general principle of the National Labor Relations Act in granting employees the "fullest freedom" in choosing worker representatives. This interpretation of section 9(b)(3) strips away the statutory rights of workers without justification in the act or its history.

Through S. 1018, Congress can reassert its policy authority over matters of national labor law. The bill has the virtue of simplicity; it amends section 9(b)(3) by the addition of one word—"plant." The bill thus states explicitly what has always been in the clause implicitly—that the section applies only in the context of plant guards.

This bill would not affect the guard status of those who function as plant guards, whether as immediate employees of the plant-owner or as employees of a business that supplies protective services for other employment premises. The labor organizing rights of such stationary guards would continue to be governed by section 9(b)(3).

It is the intent of this legislation to clarify the guard clause, however, for thousands of other American workers. Under S. 1018, employees engaged in the transportation, delivery, or safekeeping of property would not be deemed to be guards when responsible solely for the property of the employer's customers.

Such bailees would not be considered guards simply because they carry firearms, are bonded, must pass a security clearance, are commissioned as law officers, or are allowed access to the customer's premises for the purpose of delivering cargo. The bill would restore the full organizing rights of employees in the service industry, as well as dressing room attendants, hat checkers, and others who act only as bailees of the property of others for which the employer is responsible.

S. 1018 would end the second-class labor rights of thousands of Americans, by granting them once again the right to choose the bargaining agent they believe will best represent them. It is a matter of simple justice and I urge your favorable consideration.

Mr. Chairman, since 1935 it has been the policy of the United States that people who work should have a free choice—a free choice of whether they wish to belong to a union and have a collective bargaining agent or not. And a free choice, if they should choose to be unionized, to choose the union to which they wish to belong. Exceptions should be very narrowly construed, particularly when those exceptions now go beyond the meaning and the intent of the people who passed the Taft-Hartley Act in 1947.

This bill simply, Mr Chairman, grants to American citizens the right of free choice.

Thank you.

Senator NICKLES. Thank you very much. I could not help but almost be, I guess concerned when we pass legislation daily that has thousands and thousands of words in it and here we have this much controversy over inserting one word.

Senator GORTON. Mr. Chairman, it is a paradox when last fall we passed a farm bill which was measured in pounds rather than pages, when we are now about to consider a tax reform bill which I understand in its latest manifestations is 1,500 pages long, that here we have quite a few witnesses and a great deal of controversy over one word.

Senator NICKLES. That is right.

Senator GORTON. At least people will be able to understand it.

Senator NICKLES. I appreciate your interest. I do not know if you care to stay for our next witness. I do not have any additional questions, but I do appreciate your leadership in this area and also your statement which I did read and which was very thorough.

Senator GORTON. If I may, I would like to make a couple of introductions of future witnesses and then I have an immediate appointment.

Senator NICKLES. Certainly.

Senator GORTON. If it is all right, I will come back and listen to some of the testimony in the next 30 minutes or so.

Senator NICKLES. Certainly.

Senator GORTON. The first panel, Mr. Chairman, on behalf of this bill includes two people whom I would like to introduce to you. Mark Endresen is the chairman of the Research Department of the Western Conference of Teamsters. Mr. Endresen works in the Seattle office of the Western Conference and has extensive experience with the specific problems created by the NLRB's interpretation of the guard clause in my home State.

In addition, I would like to introduce Professor James Medoff. Dr. Medoff has a doctorate degree from Harvard University in economics. He is now a professor of economics at Harvard and a professor of public policy at the Kennedy School of Government.

His most recent addition to a long line of scholarly works is his book entitled "What Do Unions Do." This book was listed by Business Week as one of the 10 best economics or business books published in 1984. Professor Medoff has researched the divided loyalty issues surrounding section 9(b)(3) and will be sharing his thoughts with the subcommittee this morning.

Finally, Mr. Chairman, I would like to recognize another constituent of mine who will be testifying later this morning on the opposite side of the issue. Melvin Bailet is the senior vice president of Mayne Nickless, Inc., of Seattle. He is the in-coming president of the National Armored Car Association and will be discussing that industry's thoughts on S. 1018.

With that, I thank you very much for your patience.

Senator NICKLES. Thank you, Senator Gorton. I welcome them and you are more than welcome to participate in any or all of this morning's hearing. If you want to, you can chair a great portion of it.

Senator GORTON. Thank you.

Senator NICKLES. Thank you very much.

Mr. Endresen, please proceed.

STATEMENT OF MARK C. ENDRESEN, CHAIRMAN, RESEARCH DEPARTMENT, WESTERN CONFERENCE OF TEAMSTERS; AND JAMES L. MEDOFF, PROFESSOR OF ECONOMICS, HARVARD UNIVERSITY

Mr. ENDRESEN. Thank you, Senator. I appreciate the opportunity to come before you and, speaking on behalf of the employees that are affected by the legislation, try to put a human face on this proposed legislation.

I bring greetings from Arnie Weinmeister, who is my boss and the director of the Western Conference of Teamsters, and a vice president with the International Brotherhood of Teamsters.

My brief comments this morning—I will abbreviate them even further, because I think Senator Gorton very thoroughly and very ably discussed the situation, both in terms of the law and the impact on employees. I would like to state that the representation loss by the employees the Teamsters have represented in the past, has been a loss financially and also a loss of choice. And I make the contention that the costs associated with these losses outweigh the benefits to other parties. Also, without getting too much into second-guessing as to what the Senate and Congress in their wisdom may have done in the past, I would like to touch on the idea that the proposed legislation may actually return the act to its original legislative intent.

Employees of armored car companies have lost Teamster representation without a say and without a vote. Because of a change in the National Labor Relations Board's interpretation of the law, companies walked away from labor agreements that had been negotiated for decades. Without union representation to deal with, Brinks, Pony Express and others reduced wages and benefits dramatically and terminated pension contributions. In Washington State and the West, hundreds of armored car and courier drivers have been affected.

Wage rates for these drivers in the Seattle area have been reduced from $10.25 per hour to $7 and less. Medical plans provide mainly for catastrophic illness and most companies offer no meaningful retirement plans. Under the former labor agreements, the medical plans paid for most medical care and the pension contribution provided for a pension of approximately $1,000 per month at normal retirement. Those most affected have been the older drivers who had built up the most benefits and who have had the fewest opportunities for other employment.

In addition to the substantial financial losses, the drivers lost a right of choice. Separated from Teamster representation, with no way of regaining it, the drivers have little recourse. They cannot seek representation from most other unions and they cannot effectively represent themselves. This leaves them without the same rights under current labor laws that apply to almost all other workers in the United States. On this, I note with some irony the concurrent moves in the United States to expand the economic choices of individuals while restricting personal choices such as these.

The questions arise in this situation: What are the benefits and what are the costs? The employers may initially benefit, but in the long run competition should eliminate that benefit. Users of the service may benefit from reduced charges. On the other side, employees suffer financially through the loss of effective representation and through the loss of choice.

We in the Teamsters maintain that the large costs suffered by the drivers outweigh benefits that may accrue to other parties. The legislation that is being considered here has considerable appeal for many reasons. It corrects a situation in need of correction, it is simple and understandable, and it harms no one.

Passage will not by itself unionize any drivers, but if permitted drivers do choose to regain Teamster representation, they will have a chance to regain some lost benefits and gain a measure of freedom of choice.

Thank you for your consideration.

[The prepared statement of Mr. Endresen follows:]

WESTERN CONFERENCE OF TEAMSTERS
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Arnie Weinmeister
International Director

April 21, 1986

TESTIMONY ON ARMORED CAR AND COURIER DRIVERS
Before the Senate Subcommittee
By Mark C Endresen, Chairman
Research Department
Western Conference of Teamsters

Employees of armored car companies have lost Teamsters representation without a say and without a vote. Because of a change in the National Labor Relations Board's interpretation of the law, the companies walked away from labor agreements that had been negotiated for decades. Without union representation to deal with, Brinks, Pony Express and others reduced wages and benefits dramatically and terminated pension contributions. In Washington State and the West, hundreds of Armored Car and courier drivers have been affected.

Wages rates for these drivers in the Seattle area have been reduced from $10.25 per hour to $7.00 and less. Medical plans provide mainly for catastrophic illness and most companies offer no meaningful retirement plans. Under the former labor agreements, the medical plans paid for some everyday care and the pension contribution provided for a pension of approximately $1,000 per month at normal retirement.

In addition to the substantial financial losses, the drivers lost a right of choice. Separated from Teamsters representation with no way of regaining it, the drivers have little recourse. They cannot seek representation from most other unions and they cannot effectively represent themselves. This leaves them without the same rights under current labor laws that apply to almost all other workers in the United States.

The questions arise in this situation: What are the benefits and what are the costs? The employers benefit in the long run competition will eliminate this benefit. Users of the service may benefit from reduced charges. On the other side, employees suffer financially, through the loss of effective representation, and through the loss of choice. We in the Teamsters maintain that the large costs suffered by the drivers outweigh any benefits that may accrue to the users.

The legislation that is being considered here has considerable appeal for many reasons: it corrects a situation in need of correction, its simple and understandable and it harms no one.

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Senator **Nickles** Thank you very much. We appreciate your comments.

Professor Medoff.

Mr. **Medoff**. Good morning, Mr. Chairman.

As Senator Gorton said, I teach at Harvard University about unions and I have written——

Senator **Nickles**. Could you pull the microphone a little closer so that the people in the back can hear? Thank you.

Mr. **Medoff**. Let me start over again, say good morning to you again, and repeat that, as Senator Gorton said, I teach about unions at Harvard and I have written a bit about what unions do in this country. In each case I have tried to look at the facts of the matter and to avoid self-serving and emotional rhetoric.

What I am going to do today will be conditioned very much by that philosophy, as I will try to talk about the facts that surround this 9(b)(3) issue, trying to separate them from the self-serving and emotional rhetoric that has come to be associated with the matter.

Let me foreshadow my remarks by saying that after reviewing Senator Gorton's amendment to section 9(b)(3) and after doing some research on the legislative history and life under the act as it is written, as well as looking at the history of labor law in Canada, I conclude that this amendment is a step in the right direction in that it limits employers who are, I believe, unjustly trying to use the Taft-Hartley Act in their struggle over compensation with employees.

What I would like to do first in my remaining 2½ minutes is to outline the facts showing that the competitive pressure confronted by employers of guards has grown substantially during the past 10 to 15 years. Then I want to discuss the way that employers have tried to obfuscate the fact of that they are trying to avoid this increased competitive pressure by appealing to this alleged problem of divided loyalties.

We can fairly easily look at the wage premia that are enjoyed by union members in various occupations throughout the country. When we look in the private sector at guards, we will see that unionized guards currently receive 26 percent higher hourly earnings than do comparable nonunion guards. This union wage premium has grown quite dramatically since 1973, when it was only 16 percent.

The guard occupation is not the only job in which union members have fared very well relative to similar non-union employees in the past decade. If we look at all service occupations, we see that the union wage premium has grown from 20 percent in 1973 to 29 percent in 1984. For all occupations in the private sector, we see that the wage advantage has grown from 21 percent in 1973 to 27 percent in 1984.

We all know that there have been dramatic structural changes in our economy that have accompanied these dramatic increases in union wage premia. These include items like deregulation and the increased involvement of foreign governments in foreign trade. Most importantly for the issue at hand, I would point to the Monetary Control Act of 1980, which forced Brinks to compete directly with non-union competitors for the business of member banks.

In other words, you have a situation where forces in the economy are causing employers to compete in ways that they heretofore had not competed, and you have, at the same time, unions who had become very powerful on the wage front throughout the seventies. The wage advantages began during the period of very high-inflation, when workers throughout the country had become somewhat poorer due to OPEC price increases. Unions continued to bargain strongly for the wages of their members. While their real wages did not grow, union workers' relative wages, that is, their wages compared to comparable non-union workers, grew substantially.

Well, employers, as we all know, have taken a number of steps to avoid unions or to bust unions in this country. Many employers prefer to keep a "nice guy" image, trying to obfuscate their attempts to keep unions out of their environments. Employers of guards, I think, have tried to do this by appealing to the idea of divided loyalties.

Being a man of the facts, an empiricist, I sought evidence that indicated that this alleged problem of divided loyalties was a real problem. I did a review of relevant history in the U.S., albeit cursory and I could find no evidence whatsoever that this alleged problem was in fact real.

I then turned to Canada, because Canada's economy is quite similar to ours, and I knew that the labor laws that govern in the Canadian provinces do not have a section 9(b)(3) or an analog to our section 9(b)(3). I therefore wondered what the Canadian experience had been.

To get this information, I turned to a colleague at Harvard, Prof. Paul Weiler, who is a professor of labor law at Harvard Law School, and who served as the chairman of the Labor Review Board in British Columbia. Paul Weiler wrote the labor law for British Columbia. This law was modified slightly and then adopted by all of the other provinces. Weiler is thus someone who knows quite well what the absence of 9(b)(3) has meant in the Canadian situation.

Weiler told me that the issue of divided loyalties had never once arisen in the Canadian economy, and his feeling, which is really my feeling, is that this really is nothing more than a red herring. It has been thrown out to keep people considering this issue away from the fact of the matter, which is that employers of guards or other employees who are unionized are confronting very serious competitive pressure which they have not felt before and are responding to this pressure in their dealings with unions.

Senator **Nickles**. Professor, do you agree with that assessment? Is that your assessment as well?

Mr. **Medoff**. Yes, it is my assessment and I would say that I was pleased that Professor Weiler agreed with me.

[The prepared statement of Mr. Medoff follows:]

JAMES L. MEDOFF

Good morning Mr. Chairman and Members of the Subcommittee. I am James Medoff, Professor of Economics at Harvard University and Professor of Public Policy at Harvard's Kennedy School of Government. I am here today as an expert on the issue of unionism in the U.S. economy. In 1984, I co-authored a book called "What Do Unions Do?" in this book we attempted to provide an objective, empirical assessment of the impact of trade unions on our country's economic and political systems. We were extremely pleased that the book was well reviewed by both management and labor. The book was listed by Business Week as one of the ten best economics or business books published in 1984 and selected by the Academy of Management as the co-winner of the George Terry Book Award for "the book judged to have made the most outstanding advancement to management knowledge during 1984".

I was asked by Senator Gorton to assess the value of his proposed amendment to section 9(b)(3) of the Taft-Hartley Act. My belief is that the Gorton amendment represents a step in the right direction in that it limits the ability of management to unjustly use the Taft-Hartley Act in struggles with its employees over compensation.

In this statement I will first present evidence on hourly wages which helps explain why during the past decade employers of unionized guards sought new ways to limit these workers' freedom to be represented by as strong a union as possible. I will then argue that section 9(b)(3) of the act is being used solely to weaken the bargaining hand of labor, a fact which employers have tried to obfuscate with mention of the alleged problem of divided loyalties.

The Compensation Advantage for Unionized Guards

In 1984, throughout the U.S., private sector employers paid unionized guards about 26 percent more than they paid for similar guards who were not in unions.[1] While this union premium is quite large, it is based solely on hourly earnings and, thus, ignores union-nonunion differences in fringe benefits. If fringes were included, the premium would be expected to be even larger.

If we turn back to 1973, we find that private employers were paying only 16 percent more for unionized guards than they were for similar guards who were not union members. Thus, we see that during the seventies the relative unit labor costs incurred by employers of unionized guards are likely to have grown substantially. This implies that the competitive position of employers who rely heavily on guards grew much weaker during this period.

The figures on wage differentials presented are quite consistent with those cited by companies which make great use of unionized guards. For instance, in 1984 Brinks stated that their wages were 35 percent higher than their competitors.[2] It is also instructive to note that Brinks felt that this union wage premium was instrumental in causing them to lose business from the Federal Reserve System, once the Monetary Control Act of 1980 forced Brinks to compete with nonunion competitors for the business of member banks.

Efforts to Avoid Union Wage Pressure

The wage advantage won by trade unions grew throughout the private sector during the past ten to fifteen years. Averaging across occupations, we find that while union members received 21 percent more than similar nonunion employees in 1973, they received 27 percent more in 1984. If the same sort of comparison is limited to employees in service occupations, we find that the union wage advantage rose from 20 percent in 1973 to 29 percent in 1984.

The growth in the union wage premium in and of itself could be expected to weaken unionized employers' ability to compete in product markets. Moreover, the impact of the growth in the union wage advantage was most certainly magnified by events such as deregulation, the rising price of the dollar, greater foreign goverment involvement in private sector world trade, and pieces of legislation like the Monetary Control Act of 1980 (which was described above).

With the increased union wage advantage and the growth in product market competition, it is no wonder that employers took a variety of steps to "bust" and avoid unions. For example, during the period of concern there was a sharp growth in the number of successful union decertifications. Also, the period witnessed a dramatic increase in the number of 8(a)(3) charges per election (primarily due to the firing of union supporters) deemed to have merit by the Board. Furthermore, the past decade witnessed a dramatic increase in the funds used to hire management consultants who specialize in keeping workplaces union free. And finally, there has been of late a marked increase in the efforts of employers to avoid unions by having their work done in states or countries where unions are unlikely to be a force to reckon with.

My feeling is that employers have used Section 9(b)(3) as another means of busting or avoiding unions in an environment where union wage premia are high and product market competition is great. While the employers' efforts are understandable, I feel that they are quite inconsistent with the intent of those who framed the country's labor law. The Taft-Hartley Act was supposed to give covered workers the freedom to choose the union which could represent them best. However, recent interpretations of Section 9(b)(3) of the Act (in particular, those concerning employers' duty to bargain) have allowed management to use the Act to limit the very freedom the Act was supposed to provide.

The Divided Loyalties Smoke Screen

Employers would be unlikely to want their efforts to use 9(b)(3) to "bust" or avoid certain unions to be seen as such. It is for this reason, I believe, that they have tried to use the alleged divided loyalties problem as a smoke screen. The effort to have a smoke screen is understandable in light of the preceding discussion. However, one can correctly ask whether there is any evidence that the alleged divided loyalties problem is in fact a problem at all. While I am not a historian, I can say that I was unable to uncover any evidence which supports the contention that the alleged divided loyalties problem has ever been a real one in this country. Moreover, I have gathered some information on Canada, where none of the provinces has a labor law with a section analogous to our section 9(b)(3). From what I could learn, the problem of divided loyalties has never really surfaced in Canada, a fact that cannot be attributed to a provision like Section 9(b)(3).

Conclusion

It is my view that a more precise definition of the word "guard" would be desirable since it would limit employers' ability to use the Taft-Hartley Act in a fashion inconsistent with the intent of its framers. Adding the word "plant" is an improvement over the status quo. Adding the clause "at a location where a union has other employees organized" would be a still bigger improvement. However, the biggest improvement of all would come with the repeal of 9(b)(3).

FOOTNOTES

1. The union wage premium generated for this statement are based on data collected by the Bureau of Labor Statistics in its Current Population Survey program. Employees are deemed similar if they are the same sex, race, and age, have the same education, are in the same industry and occupation, and live in the same region.
2. See Hearings Before the Subcommittee on Labor, Committee on Human Resources, U.S. Senate, 95th Congress, 1st Session, S. 1883, The Labor Reform Act of 1977, p. 577. While the 35 percent figure pertained to 1977, Brinks continued to use it in the 1980's.

Senator NICKLES. Mr. Endresen, how many Teamsters have you lost that you used to represent in this guard definition? Do you happen to have the numbers?

Mr. ENDRESEN. I do not have a solid number that would define it completely, but certainly in the thousands.

Senator NICKLES. In the thousands, nationwide or just in the Western Conference?

Mr. ENDRESEN. We would have in the thousands, 2,000 and more in the Western Conference. In the Western Conference of Teamsters, we represent some 400,000 Teamsters in various occupations in 13 Western States, and just checking with a couple of local unions we had losses of 300 and 400 in local unions

Senator NICKLES. You think altogether probably around 2,000 or something?

Mr. ENDRESEN. Or more, yes

Senator NICKLES. More?

Mr. ENDRESEN. Yes.

Senator NICKLES. Were a substantial percentage of those represented by another union after they were no longer affiliated with the Teamsters?

Mr. ENDRESEN. No. No, they have by and large not become represented by anybody. There are alternatives that certainly the people can turn to, guard unions, perhaps forming a union of their own, but in this climate, if you will, of labor relations, it is very difficult for an organization that is not very strong and does not have the resources to represent these members to go out, organize them and try to negotiate a labor agreement.

Senator NICKLES. Let's talk about the issue of divided loyalty. We heard the professor mention it just briefly. Let us say, for example, an armored car driver who worked for Brinks, Wells Fargo or whoever, is to pick up or deliver and cross the picket line; there is a strike involving XYZ organization or docks or whatever. Have you had a situation where that driver would not cross the picket line because his fellow Teamsters were on strike?

Mr. ENDRESEN. I do not have any personal knowledge of that. If that did happen, it would usually involve a situation where the company would have a supervisor drive with the driver, and if the company knew that this driver had a right to not cross that picket line, a protected right, the company would normally, just like they do with the grocery trucks and the pop trucks and everything else, put a supervisor on that truck and the driver would drive the truck up to the plant and the supervisor would drive it across and back.

Senator NICKLES. Let us say the Teamsters also have organized XYZ distribution warehouses or stores or whatever, and there is a picket line around that store. Is there some kind of arrangement or agreement that a Teamster from one local or whatever would not cross the picket line of another Teamster strike?

Mr. ENDRESEN. Well, that would be something we would attempt to negotiate with, really, the employer. So if we were able to negotiate that with the armored car employer, we have certainly the right to try to negotiate with, say, Wells Fargo or——

Senator NICKLES. Did you have that in some of your contracts?

Mr. **Endresen**. I am certain we did. Now, here again recalling, we have some 20,000 labor agreements in the West and recalling specific provisions in each one is quite difficult.

Senator **Nickles**. But you did in some?

Mr. **Endresen**. I am certain it is in some.

Senator **Nickles**. OK. Thank you.

Professor **Medoff**, I apologize for the urgency in trying to run through this rather quickly. I want to make sure we get to all of our panelists today before we get into our votes.

Senator Hatch requested that I ask you this question. You have written a book, "What Do Unions Do?" That was published when?

Mr. **Medoff**. "What Do Unions Do?" in 1984.

Senator **Nickles**. Senator Hatch mentioned you indicated that some unions have a higher record of certain crimes than others. Obviously, some are concerned that a union with a long record of embezzlement might, through this bill, have access to enormous sums of money. Based on your knowledge in the labor field, do you think the Teamsters should be barred from representing guard employees or other employees involved in the transportation of valuables and currency?

Mr. **Medoff**. On The embezzlement issue, first, it should be noted that the number of convictions involving Teamsters was not disproportionately large. The Teamsters have a lot of convictions, but that is because they have a lot of members. If we look at all the embezzlement convictions, we will see that the Teamsters were involved in about 11 or 12 percent of them, however, we should remember that Teamsters represent about 11 or 12 percent of the unionized workforce.

Moreover, I do not think that because there have been some crimes committed by some members or officers of a union, that that particular union should be excluded from representing employees covered by the country's labor law. There is nothing in the labor law as I know it that says that this should be the case.

It is really misinterpretation of the intent of the framers of this law, I think, to say that the Teamsters should not have the right to represent guards.

Senator **Nickles**. I appreciate your comments.

Senator Gorton, do you have any comments or questions?

Senator **Gorton**. The chairman anticipated my question or questions to Mr. Endresen, but perhaps I could followup on them briefly.

Simply from the point of view of time line, 9(b)(3) of course, was passed in 1947. Am I not correct in assuming that many of these decisions which have deprived workers of the right to be represented by certain unions did not take place until long after 1947, and until relatively recent times? When, for example, did armored car drivers lose the right to be represented by the Teamsters or by any other union which represents production employees?

Mr. **Endresen**. My understanding is that it was in 1953, in a Brinks case, that the National Labor Relations Board said that if companies voluntarily recognized the labor organization that represented their employees, that they could indeed continue to represent them. Then in 1976 couriers were brought in under that provision, and then a relatively recent case that brought the idea of an employer withdrawing representation during the open period of negotiations.

Senator **Gorton**. Relatively recent, would that be in this decade, the 1980's?

Mr. **Endresen**. I really do not know. I do believe we will have that. I am sure that Wilma will know that, but I do not.

Senator **Gorton**. Thank you.

Senator **Nickles**. Senator Gorton, thank you very much.

Senator Simon, we are pleased that you have joined us this morning. Do you have opening comments or questions?

Senator **Simon**. I do not have any opening comments and unfortunately we have a markup in the Judiciary Committee, so I am going to have to head down there.

Professor Medoff, have you—and I apologize to both witnesses for not being here for your testimony—have you had a chance to look at the history of this and is the assumption that the law has been misinterpreted by the National Labor Relations Board an accurate assumption in your opinion?

Mr. **Medoff**. Again, I have to apologize for not being a lawyer, but as I understand it——

Senator **Simon**. Do not apologize to me because I do not happen to be a lawyer either.

Mr. **Medoff**. For those in the room who suffer that unfortunate fate——

Senator **Simon**. The sponsor of the bill.

Mr. **Medoff**. I had him with me right from the beginning, so I am not very worried so much about him. [Laughter.]

I think that the divided loyalties issue has been used to expand the scope of section 8(a)(5). What has happened is that employers who had unilaterally or voluntarily recognized unions have been given the right to unilaterally abrogate those agreements or in other words, these decisions by the Board, I think, have shifted the balance on the issue at hand very much toward management. This is one reason why I favor the Gorton amendment. By pointing out that divided loyalties is not a real issue and narrowing 9(b)(3) a bit in terms of the guard group, then you can swing the pendulum back toward the middle, by moving it slightly in the labor direction.

Senator **Simon**. And you say it expanded the scope, you mean expanded the scope beyond the original intent?

Mr. **Medoff**. Yes. They certainly expanded what the duty to bargain meant and they expanded it in a way which, I think, served the interests of certain representatives of the management community quite well. Again, I like this amendment, is because I think it will give labor something in return.

Senator **Simon**. Thank you.

Senator **Nickles**. Senator Simon, thank you very much.

Mr. **Endresen**. Just very briefly, Senator. In the National Labor Relations Board's decisions of 1953 and in 1976 or 1979, there is considerable discussion in the text of those decisions concerning legislative intent and that really was the legislative intent during the Taft hearings for just plant guards. In 1947, the Board decided that, yes, indeed it was and in 1953 they said no, the legislative intent extends beyond that, and so for the history of it Betty

Murphy had extensive comments in the text in a concurring opinion and if you would like copies of those we can make those available.

Senator SIMON. I would.

Senator NICKLES. Panelists, thank you very much.

Our next panelist is Edward B. Miller, who is former Chairman of the National Labor Relations Board, currently from Chicago.

Mr. Miller, welcome back before this committee.

STATEMENT OF EDWARD B. MILLER, ESQ., FORMER CHAIRMAN, NATIONAL LABOR RELATIONS BOARD

Mr. MILLER. Thank you. I did not know the azalias were blooming. It is beautiful here in Washington.

Thank you. My name is Edward B. Miller, and I am an attorney representing management, practicing labor and employment law in Chicago, with the law firm of Pope, Ballard, Shepard & Fowle, Ltd. I have spent most of my career with that firm, although I did spend, as you say, 4½ years as Chairman of the National Labor Relations Board in 1970–74. I am not here representing any employer or any employer association. I am here at the request of counsel for the subcommittee.

I do not have any very complicated or scholarly position to state. I can state it very briefly: "If it ain't broke, don't fix it."

The National Labor Relations Board, the agency with which you folks in the Congress entrusted the interpretation of the act, has, with some guidance from the courts, developed the current long-accepted interpretation of section 9(b)(3) of the act. That interpretation is now well understood by employers and unions alike. As it has been developed, the meaning of the law has also been well accepted by the courts.

I do not see any need to detail all of the history. It has been exceedingly well summarized by Jeff McGuiness in his monograph published by the Industrial Research Unit of The Wharton School at the University of Pennsylvania. You have probably seen it. It is entitled "Guard Unions and the Problem of Divided Loyalties," volume 3a of the Industrial Research Unit's Labor Relations and Public Policy Series. It is a careful and accurate review of the history of the application of the provision about which you gentlemen have been inquiring in the last few minutes.

Very briefly, here is the history: The section was added in 1947 and required, as you have said and as Senator Gorton said, to require guards to be represented in separate units and by separate unions. It did not say "plant guards," it said "guards." It defined "guards" as persons employed to enforce rules and protect property not only against fellow employees, but also against "other persons." And it talked of protecting not just the employer's property, but also property "for which the employer is responsible."

At the very first, the NLRB did not read the section very carefully, and it was the Sixth Circuit Court of Appeals that called the Board's attention to its failure to heed the statutory language, and that was in the *ADT* case in 1953, (*NLRB* v. *American District Telephone Company of Pennsylvania,* 205 Feb 86 [1953]) which has been mentioned recently.

The Board then began to follow what Congress had written and under *Armored Motor Service Co. Inc.*, 106 NLRB 1139 (1953) and for 30 years and more now, it has applied the law to all guards, including armored car guards and courier guards. That has been true under both Republican and Democratic administrations, and neither the courts nor the Congress have found the Board to be in error.

On the other hand, the Board has not, I think, gone to great extremes. It has not found, for example, persons such as tower observers concerned with protecting animals to be guards, although the contention was made that they were. (*Lion Country Safari*, 225 NLRB 969 [1976])

Under the Board's detailed interpretations, as they have developed, the safety of persons and property is given high priority, and the security of property is well safeguarded. There is little or no temptation with this separation for employees entrusted with the custody and protection of such property to be negligent in their duties or to fail to fulfill their duties out of sympathy with fellow union members who are engaged in a labor dispute.

It is difficult for me, at least, to see why that policy should be perceived as evil or as somehow threatening to sound labor relations policy.

It is true, as has been said here this morning, that employees who are engaged in what have been held to be guard activities are, to some degree, limited in their choice of unions. But I do not know of any evidence that the various unions which do limit their membership to guards are not representing them well, effectively and honestly. I think it might have been more helpful to this committee if Professor Medoff, instead of asking his colleague, Professor Weiler, what goes on in Canada, had looked instead at that issue and researched whether there has been any failure on the part of the established guard unions to represent employees effectively, honestly, and well.

If guards are being well represented today and if this separation of guard unions from nonguard unions is assisting in maintaining the security of persons and property throughout the land, why is the Congress interested in rushing to fix something that ain't broke? Does the Congress have any solid evidence that there are a lot of guards out there seeking union representation whom the established guard unions are not trying to organize or are not interested in organizing?

These employees who decertified the Teamsters, as was mentioned a few minutes ago, are they just aching to have somebody represent them? Have they contacted any of the guard unions seeking representation? Not so far as I know.

Or is it simply the fact that some other nonguard unions would like an opportunity to raid the guard unions? I hope it is not the latter. The trade union movement has been recognizing in recent days that it has wasted a lot of valuable time and energy in internecine warfare, with sister unions vying with each other for the privilege of representing employees, instead of getting out and organizing the unorganized. Is this Congress really interested in furthering internal union disputes and raiding tactics? I doubt it.

Then what is the reason for S. 1018? Does not this Congress have some very important things to do? Is it really worth your time and effort deliberately to upset an established definition which has worked well to protect persons and property and which still offers employees an opportunity for representation by what so far as I know are perfectly good unions?

I can think of a lot more important things to which this subcommittee and the full committee and the Congress as a whole could be devoting their time. Neither you nor I, I think, need to waste a lot of time on this. It is really very simple: If it ain't broke, don't try to fix it.

Thank you.

[The prepared statement of Mr. Miller follows:]

STATEMENT OF EDWARD B. MILLER* BEFORE SUBCOMMITTEE ON LABOR, UNITED STATES SENATE COMITTEE ON LABOR AND HUMAN RESOURCES, APRIL 24, 1986

My name is Edward B. Miller. I am an attorney, representing management, practicing labor and employment law in the City of Chicago with the law firm of Pope, Ballard, Shepard & Fowle, Ltd. I have spent most of my career with that firm, although I spent four and a half years as Chairman of the National Labor Relations Board (May of 1970 through December of 1974). I am not here representing any employer or association of employers, but instead am here at the request of counsel for the Subcommittee on Labor.

I do not have a complicated position to state. I can state it very briefly. It is "If it ain't broke, don't fix it."

The National Labor Relations Board--the agency with which you ladies and gentlemen of the Congress entrusted the interpretation of the Act--has, with some guidance from the courts, developed the current long accepted interpretation of Section 9(b)(3) of the Act. That interpretation is now well understood by employers and unions alike. As it has now been developed, the meaning of the law is well accepted by the courts.

I see no need to detail all of the history. It has been exceedingly well summarized by Jeffrey McGuiness in his monograph published by the Industrial Research Unit of The Wharton School at the University of Pennsylvania. I am sure you have seen it.

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* Senior Labor Counsel, Pope, Ballard, Shepard & Fowle, Ltd., Chicago, Illinois (former Chairman NLRB, 1970-1974).

It is entitled "Guard Unions and the Problem of Divided Loyalties" and is Vol. 3a of the Industrial Research Unit's Labor Relations and Public Policy Series. It is a careful and accurate review of the history of the application of the provision.

Very briefly, however, here's the history. Congress in 1947 added Section 9(b)(3) and required guards to be represented in separate units and by separate unions. It did not say "plant guards," it said "guards." It defined "guards" as persons employed to enforce rules and protect property not only against fellow employees, but also against "other persons." And it talked of protecting not just the employer's property, but also property "for which the employer is responsible."

At first, the NLRB did not read Section 9(b)(3) carefully. But after the Sixth Circuit Court of Appeals called the Board's attention to its failure to heed the statuory language in the ADT case in 1953,1/ the Board began to follow what Congress had written. Under the Armored Motor Service case,2/ and for thirty years and more now, it has applied the law to all guards, including armored car guards and courier guards. This has been true under both Republican and Democratic administrations. Neither the courts nor the Congress have found the Board to be in error.

1/ NLRB v. American District Telegraph Company of Pennsylvania, 205 F.2d 86 (3rd Cir. 1953).

2/ Armored Motor Service Co., Inc., 106 NLRB 1139 (1953).

On the other hand, the Board has not gone off base and found persons such as tower observers concerned with protecting animals to be guards.[3]

Under the Board's detailed interpretations, as they have developed, the safety of persons and property is given high priority, and the security of property is well safeguarded. There is little or no temptation for employees entrusted with the custody and protection of such property to be negligent in their duties or to fail to fulfill their duties out of sympathy with fellow union members who are engaged in a labor dispute.

It is difficult for me to see why that policy should be perceived as evil or as threatening to sound labor relations policy.

It is true that employees engaged in what have been held to be guard activities are, to some degree, restricted in their choice of unions. But I know of no evidence that the various unions which do limit their membership to guards are not representing them well, effectively, and honestly. If guards are being well represented today, and if this separation of guard unions from non-guard unions is assisting in maintaining the security of persons and property throughout the land, why is the Congress interested in rushing to fix something that ain't broke?

Does the Congress have any solid evidence that there are a lot of guards out there seeking union representation whom the established guard unions are not trying to organize or not interested in organizing? Or is it simply the fact that some other non-guard unions would like an opportunity to raid the guard unions?

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[3] Lion Country Safari, 225 NLRB 969 (1976).

I hope it is not the latter. The trade union movement has been recognizing, in recent days, that it has wasted a lot of its valuable time and energy in internecine warfare--with sister unions vying with each other for the privilege of representing employees, instead of getting out and organizing the unorganized. Is this Congress really interested in furthering internal union disputes and raiding tactics? I doubt it.

Then what is the reason for Senate Bill 1018? Doesn't this Congress have some very important things to do? Is it really worth your time and effort deliberately to upset an established definition which has worked well to protect persons and property and which still offers employees an opportunity for representation by perfectly good unions?

I can think of a lot more important things to which this Subcommittee, and the full Committee and Congress as a whole, could be devoting their time. Neither you nor I need to waste a lot of your time on this. It's really very simple.

It ain't broke. Ladies and gentlemen, don't try to fix it.

Thank you.

April 1986

Senator **Nickles**. Mr. Miller, thank you for your comments. You were Chairman of the NLRB in what time period?

Mr. **Miller**. 1970 to 1974.

Senator **Nickles**. I think I heard you state that you felt the Board's interpretation or definition of what was a guard has been fairly consistent since 1953.

Mr. **Miller**. I would say so, yes.

Senator **Nickles**. Is that correct?

Mr. **Miller**. Yes.

Senator **Nickles**. There really has not been a change in application by the NLRB.

Mr. **Miller**. Not significantly with respect to the definition. I think the previous witnesses were correct, and I am sure one of their lawyers will detail this for you. I believe it is of relatively recent origin that the Labor Board has said that—well, for a long time it said that a union which did not restrict its membership to guards could not be certified as the representative in a Labor Board election.

But I think it has been fairly recently that somebody argued to the Board that if, as was true at Brinks at one time, there has been recognition of the Teamsters, although no certification, then if the company refuses to bargain with that union, the Board should order the company to bargain with it, even though there is no certification.

The Board has fairly recently—and I forget the exact year—said no, we are not going to allow to happen indirectly what we will not do directly. If we will not certify the union, then we should not in a voluntary case require continued recognition of the union that is not entitled to certification. That has been a relatively recent change.

There are, of course, always new cases as to what is a guard and what is not. It is not always easy to decide, and you might agree with some of those decisions and disagree with others. But I think the Board under both Republican and Democratic administrations has tried to draw that line reasonably carefully.

Senator **Nickles**. Do you think the statute is fairly clear or complies with the original?

Mr. **Miller**. I think it is. The courts have said it was. They told the Board that they had better interpret it this way and they have now for 30 years.

Senator **Nickles**. You think it complies with the original intent?

Mr. **Miller**. I think so. If you look at that legislative history, I think it is very difficult to find anything that says it was intended to be restricted to plant guards. That was one of the concerns of Congress, but I do not think it is fair to say that Congress was purely limiting it to that.

Senator **Nickles**. I also think I heard some of our previous witnesses say that companies have been trying to expand this and include a much broader definition of "guard" and maybe include persons, bellmen and so on. Is that happening?

Mr. **Miller**. As I say, there is always the interpretation of who is within this definition, who are primarily assigned to protect persons and property. As I say, you may disagree with some of those interpretations. I do not know, I might disagree with some of them myself, but they are not easy ones to make and the Board makes them in good faith and if there is something wrong they go to the courts. I do not know of any that have been upset.

Senator NICKLES. Thank you very much, Mr. Miller.

Mr. MILLER. Thank you.

Senator NICKLES. We appreciate your appearance before the committee today.

Our next witness is Wilma Liebman, staff attorney, representing the International Brotherhood of Teamsters.

Wilma, welcome to our committee.

STATEMENT OF WILMA B. LIEBMAN, STAFF ATTORNEY, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ACCOMPANIED BY EDWIN HUCKE, PRESIDENT, TEAMSTERS LOCAL 725, CHICAGO, IL

Ms. LIEBMAN. Good morning, Mr. Chairman, and thank you. I am an attorney with the International Brotherhood of Teamsters, and I am appearing here this morning on behalf of General President Jackie Presser, who is not able to be here today. I am here to submit his statement for the record.

I would also like to attach, if I may, to our statement as an exhibit a 1985 American University Law Review article from volume 35, page 175, entitled "The Guards Trilogy: The NLRB Lowers the Guard on Employee Rights." It is a persuasively written article and I think it should be part of the record.

We welcome this opportunity to present our views endorsing S. 1018. The special need for this amendment arises from the decisions of the National Labor Relations Board that in our view misconstrue the language of 9(b)(3) and stray from the original legislative intent. The result of the Board's policy has been to deprive unnecessarily and unfairly thousands of workers of the right freely to select a bargaining representative of their choice, and that is the underpinning of our country's labor law

With all due respect to former Board Chairman Miller, we believe that it is broke.

Senator NICKLES. Could you pull the microphone a little closer, Wilma. Thank you.

Ms. LIEBMAN. Until recently, thousands of armored car drivers were represented by the Teamsters Union. Brinks, Wells Fargo, and other armored car carriers had well-established bargaining relationships with Teamster local unions all over the country, many of which dated back for decades.

Today, most of those bargaining relationships no longer exist. This is due to the misguided policy of the NLRB culminating in its 1984 decision involving Wells Fargo Armored Service Corp. The Board held that Wells Fargo was privileged because of section 9(b)(3) to unilaterally terminate a longstanding bargaining relationship with local 807 in New York. They were privileged to do so, even though their reasons for terminating the relationship were solely economic. This would have been a violation of labor law in any other case.

Based on this decision, Wells Fargo and its competitors have substantially rid themselves of union relationships throughout their systems. Thousands of our members all over the country have suffered loss of union representation, with sharp losses in wages and benefits, including valuable health, welfare, and pension coverage, and in some cases they have lost jobs.

Accompanying me here today is Ed Hucke, who is president of Teamsters Local 725 in Chicago. A few years ago, local 725 had about 1,000 members, all of them armored car drivers. The local had collective-bargaining relationships with Brinks, Purolator Armored, Illinois Armored Car, Parking Meter Services, and Gelco Courier. Today, local 725 has no contracts and no members. Many of its members have lost their jobs or suffered sharp losses in benefits. This situation unfortunately has been repeated all over the country.

Section 9(b)(3) was enacted in 1947 to deal with a very narrow and very specific perceived problem, namely to assure management loyal plant protection personnel. Whatever the debatable validity of continuing to treat plant guards uniquely in the context of the modern workplace, it is clear that Congress in 1947 had only plant guards in mind.

Instead, however, the Board has taken this very narrow exception to the overall policy of the act and has progressively expanded it, broadly defining guard to include employees engaged in bailment and transportation services and wholly distorting the divided loyalty concept that Congress articulated.

The Board thus treats armored car drivers and couriers as guards because of the fear that when making a delivery or a pickup they might confront a picket line on the customer's premises. What the Board has equated with a conflict of loyalty is the exercise of the section 7 protected right to respect a picket line. This same alleged divided loyalty confronts all truckdrivers and all deliverymen, yet the Board has somehow decided that drivers of certain types of vehicles driving certain kinds of property are disloyal for honoring a picket line, whereas others are engaged in protected activity.

If this conflict of loyalties had been what Congress had in mind, then certainly all drivers would be guards. Clearly, the key function of these alleged guard drivers is transportation. Their responsibility for the protection of the packages entrusted to them is hardly unique. All truckdrivers are responsible for the trucks and commodities entrusted to them. All have some access to customer property. There simply is no logical reason or security-related reason for treating differently the armored car carrier and the nonguard common carrier, for example, of coins, or silver bullion, or other valuable metal.

Also with me here today is a Teamster member from Cleveland, Ohio. He is employed by Yellow Freight Co., a nonguard company. His job is to transport coins from the Denver Mint to a Brinks facility in Cleveland. Indeed, many of our members hold jobs which involve trust, loyalty, and the protection of property.

Also with me today are two Teamster corrections officers, one employed by the York County, PA, Prison and one a D.C. Jail corrections officer, also a sergeant from the Long Island MacArthur

Airport Police, a nurse from a York, PA, hospital who has access to drug supplies, and a sergeant employed in security at the North Island Naval Air Station, San Diego, CA, a Federal facility.

There is no logical reason for depriving armored car drivers and couriers from union representation of their choice, when these other employees freely enjoy that right without any compromise to security or loyalty. In fact, we firmly believe that the divided loyalty issue is a pretext, a mask for union avoidance brought on by economic factors, namely the pressures of competition from substandard union wages.

This competitive situation itself was brought on by the Board's interpretation of section 9(b)(3), because the Teamsters could not organize the new entrants into the armored car and courier industry since the Board treated their employees as guards. These new companies furnish formidable competition to the older, unionized companies. Brinks itself testified to this before this committee in 1977.

It said: "The Board has created a condition which has caused a wide disparity in wages and benefits paid to such employees, an unfair competition between armored car companies."

In sum, divided loyalties has been used as the legal justification for getting rid of unions in this industry. Without S. 1018 to clarify that 9(b)(3) applies only to plant guards, the definition of guard may continue to expand and the concept of divided loyalty to magnify, thereby allowing more and more employers to use 9(b)(3) to characterize their employees as guards and then rid themselves of unions.

S. 1018 will limit this exploitative abuse of section 9(b)(3) while at the same time protecting employers' right to have loyal plant protection personnel.

In closing, I want to thank you for the opportunity to appear. I am available to answer any questions, as is Mr. Hucke. But I would like to make one point in response to Mr. Miller's statement, which is that this legislation would not compel these employees to be Teamster members. They would still have the option to choose a guard union or any other union if they wished.

Thank you.

[The prepared statement of Ms. Liebman on behalf of Jackie Presser follows:]

STATEMENT
OF JACKIE PRESSER
GENERAL PRESIDENT OF
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE COMMITTEE ON LABOR AND
HUMAN RESOURCES OF THE UNITED STATES SENATE

APRIL 24, 1986

Mr. Chairman and Members of the Subcommittee:

On behalf of thousands of our members and thousands of unrepresented employees, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America welcomes this opportunity to present our views on S.1018 which would amend §9(b)(3) of the National Labor Relations Act. The special need for S.1018 arises from decisions of the National Labor Relations Board that misconstrue the language of §9(b)(3) and stray from the original legislative intent. The result of the Board's policy has been to deprive unnecessarily and unfairly thousands of workers of the right freely to select a bargaining representative of their choice -- the basic right guaranteed by our country' labor law.

The International Brotherhood of Teamsters is a labor organization comprised of 670 local unions. The collective membership of the local unions totals approximately 1.9 million working men and women. About forty percent of our membership is employed in transporting freight and related activities. Until recently, thousands of armored car drivers were represented by this union. Brinks, Wells Fargo and other armored car carriers had well-established bargaining relationships with Teamster Local Unions nationwide, many of them dating back decades.

Today, most of those bargaining relationships are over due to the misguided policy of the NLRB culminating in its 1984 decision that Wells Fargo Armored Service Corporation was privileged to terminate a long-standing bargaining relationship with Teamsters Local 807 in New York because of the provisions of §9(b)(3) of the NLRA. [1/] Based on this decision, Wells Fargo and its competitors, such as Brinks, have substantially rid themselves of union relationships throughout their systems. Thousands of our members all over the country have suffered loss of union representation with sharp losses in wages and benefits, including valuable health, welfare and pension coverage.

Section 9(b)(3) was added to the NLRA in 1947 to deal with a very narrow and specific perceived problem. The fear was that a conflict of loyalties might exist in having the same union represent both production and maintenance employees of an employer and its plant guards who exercise police powers over other employees. If production workers struck, the plant guards' obligation to enforce rules to safeguard persons or property might conflict with their obligation to their union which, as the production workers representative, had directed the strike. Section 9(b)(3)

[1/] 270 NLRB 787, affd. 755 F.2d 5 (2d Cir. 1985), cert. denied, ——— U.S. ———, 54 U.S.L.W. 3252 (1985).

thus provided that the NLRB could not certify a union which admits both guards and non-guard to membership -- such as the Teamsters -- to represent a unit of guards.

After the enactment of this provision, the Board progressively expanded its reach. It first held that the Section was limited to employees functioning as plant guards. Then in 1953 it overruled itself, holding that armored car drivers also were guards. Armored Motor Service Company, Inc., 106 NLRB 1139 (1953). The Board perceived a different conflict of loyalties problem in that case. It feared that a conflict might arise if the drivers encountered a picket line at the customer's premises when making a delivery. In 1976 the Board extended this rationale to unarmed couriers driving ordinary vans.

Notwithstanding §9(b)(3)'s certification ban, significant bargaining rights were achieved by Teamster local unions on behalf of these so-called guard employees engaged in transportation services. Numerous bargaining relationships with armored car carriers were established before the Board's 1953 Armored Motor Service decision which were maintained voluntarily thereafter; other relationships were established after 1953 through voluntary recognition of the union by the companies. Many of these relationships continued for decades. No problems of divided loyalties were encountered because these employees were represented by the Teamsters, as distinguished from a guard union. See Labor Reform Act of 1977: Hearings on S.1883, Before the Subcomm. on Labor, Committee on Human Resources, U.S. Senate, 95th Cong. 1st Sess., 593 (1977) (Statement for Brink's, Incorporated) (copy attached hereto).

Nonetheless, because of the Board's broad application of §9(b)(3), the Teamsters, unable to obtain Board certifications or compel recognition, faced insurmountable obstacles in trying to organize employees of non-union new entrants in the armored car industry and in the rapidly growing courier delivery industry. These new entrants posed formidable competition to the older, unionized companies. As Brinks stated in 1977, the "Board has created a condition which has caused a wide disparity in wages and benefits paid to such employees and unfair competition between armored car companies." Id. at 577. Due to this wage disparity and the pressures of substantial wage competition, the unionized companies suffered deep contractions, resulting in serious loss of employment and significant concessions. Ultimately, as discussed above, the competitive pressures have led these companies to terminate their long-standing union relationships almost universally. Business Week has written of this situation as follows:

> The companies argue that they have been forced to cut wages as a consequence of the Monetary Control Act of 1980. Among other things, the Act allowed member banks of the Federal Reserve to contract for armored transport individually. Previously the Fed provided this service centrally, primarily to the big carriers' benefit. Much of the business now goes to . . . mom and pop nonunion companies that operate with modified vans instead of $100,000 armored trucks. Now they don't care who [carries their money],' says Dunbar [chairman of Federal Armored Express], who claims that some small competitors use rental vans if one of their armored trucks breaks down. He adds: 'you can do it in a wheelbarrow as long as the price is right.'
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> "Brink's, once the Fed's major contractor and the only fully unionized company, is hurting the most. A subsidiary of the Pittston Co., it sustained a 32% decline in operating profits between 1981 and 1983. . . . Brink's labor costs total $70 million a year . . . -- on revenues of $227 million in 1983 -- a rate 50% higher than the competition pays." ["The Teamsters Get Knocked Out of A Driver's Seat", Business Week, October 29, 1984.]

The Board's application of §9(b)(3) beyond plant guards as originally intended by Congress, has been most egregious in the case of employees providing transportation services. But, it is not limited to them. As Senator Gorton has recognized, numerous bailment service workers, such as dressing room attendants, are denied effective representation because the Board defines them as "guards." See generally, Steven G. Kahn, "The NLRB's Misinterpretation of the Guard Provision," Labor Law Journal (June 1984). S.1018 would amend §9(b)(3) by clarifying that it applies to plant guards only. The proposed amendment does not seek to repeal §9(b)(3), merely to correct the NLRB's unwarranted extension of the section's restrictions to delivery and bailment service workers. We wholeheartedly endorse S.1018. It properly will restore §9(b)(3) to it original narrow intent. Whatever the debatable validity of continuing to treat plant guards uniquely in the context of the modern workplace, the 1947 Congress clearly had only them in mind. There is no reason or practical necessity to extend §9(b)(3) any further. As Brinks testified in 1977, the Board's broad application of §9(b)(3) "effectively defeated the purpose for which the Act was passed." Id.

I.

SINCE THE ENACTMENT OF SECTION 9(b)(3) THE BOARD HAS PROGRESSIVELY EXTENDED ITS REACH, THEREBY INCREASING THE GROUPS OF EMPLOYEES DEPRIVED OF FULL PROTECTION OF THE ACT

A. The Statutory Provision And Its History.

Section 9(b)(3) was added to the statute in 1947 and provides that in determining the appropriate unit for collective bargaining, the Board shall not

> decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect the safety of persons on employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits

> to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Prior to the enactment of Section 9(b)(3), the Board had permitted an employer's militarized plant guards to be represented, albeit in a separate bargaining unit, by the same labor organization which represented the employer's production and maintenance employees. This approach was challenged by the Sixth and Seventh Circuit Courts of Appeals. In denying enforcement of a Board bargaining order, the Sixth Circuit reasoned, in NLRB v. Jones & Laughlin Steel Corp., 154 F2d 923 (1946), that while plant guards were "employees" under the Act, they were in a unique category because of their special relationship to fellow employees and the police powers they exercised. They had a primary obligation to their employer and to the community as sworn, bonded, and commissioned police officers. If strikes or industrial unrest occurred involving production employees, the plant guards' obligations to enforce rules or regulations they were hired to enforce would conflict with their obligations to their union which, as the representative of production employees, authorized and directed the strike. In the Sixth Circuit's view, representation of the plant guards by the same union that represented production employees contravened public interest. The Seventh Circuit

Court of Appeals issued a similar decision in NLRB v. Atkins & Co., 155 F2d 567 (7th Cir. 1946).

The Supreme Court reversed both decisions, however, finding no evidence that the divided loyalty consequences feared by the Courts of Appeals had materialized. [2] It concluded that guards organized in a separate bargaining unit had a legitimate right to select as their bargaining agent the same union which represented production and maintenance workers.

The Supreme Court's decisions were issued while Congress was debating the 1947 amendments to the National Labor Relations Act. The legislative history quite clearly reveals that those decisions triggered the enactment of Section 9(b)(3). [3] The original House Bill reflected Congress' concern by including within the statutory definition of "supervisor," excluded from the Act's coverage, individuals employed in "police . . . matters." [4] The House Report justified this exclusion by pointing to the need of management to have "faithful agents" without the risk of divided loyalty, stating that "plant policemen and guards prevent disorder and report misconduct of employees and of unions and their members." [5]

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[2] NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 427 (1974); NLRB v. Atkins & Co., 331 U.S. 398 (1947)

[3] Cong. Rec., 80th Cong., 1st Sess. 6601, 6658, 6663 (1947) (remarks of Senators Taft and Murray).

[4] H.R. 3020, 80th Cong. 1st Sess. (1947), Sec. 2(12)(b).

The corresponding Senate Bill was silent on this issue. The resulting compromise, Section 9(b)(3) of the Labor-Management Relations Act, was drafted in conference. The Section affords organizational rights to "guards," but only in units segregated from non-guard employees, and it denies labor organizations which admit non-guards to membership the right to be certified as the representative of a unit of guards.

The report of the conference committee makes it clear that the final version of section 9(b)(3) was directed specifically at plant guards:

> As has been previously stated, the Senate rejected a provision in the House bill which would have excluded plant guards as employees protected by the Act. The conferees on both sides, however, have been impressed with the reasoning of the Circuit Court of Appeals for the Sixth Circuit in the Jones and Laughlin case in which an order of the Board certifying as a bargaining representative of guards, the same union representing the production employees was set aside. Although this case was

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[5] See, House Report No. 245, 80th Cong. 1st Sess. 16 (1947).

> recently reversed by the Supreme Court on the ground that the Board had it within its power to make such a holding, four of the Justices agreed with the Circuit Court of Appeals holding that this was an abuse of the discretion permitted to the Board under the Act. [Cong. Rec., 80th Cong; 1st Sess. 6601 (1947). (emphasis added].

In discussing the compromises that had gone into the final version of the Act, Senator Taft stated:

> We accepted a provision regarding plant guards. We had exempted foremen in the Senate bill, but we had not exempted plant guards. The House bill exempted plant guards, and also time-study employees and personnel forces. We did not accept any of those provisions, except that as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees. [Id. at 6603. (emphasis added).]

In expressing his disappointment with the results of their efforts, Senator Murray remarked that "the conferees have adopted a new rule with respect to plant guards in Section 9(b) denying them rights under present legislation." Id. at 6658. [6]

B. The Board's Original Reading of Section 9(b)(3) As Applying Only To Plant Guards

After the passage of Section 9(b)(3), the issue of its applicability to employees other than plant guards was raised in Brink's Inc., 77 N.L.R.B. 1182 (1948). After an exhaustive study of the legislative history of Section 9(b)(3), the Board held that armed drivers of armored trucks who transported valuables, not for their employer, but for customers of their employer were not statutory guards.

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[6] He stated that §9(b)(3) "is not a change that is necessary for any reason that I know of. It was simply put in arbitrarily." Id.

In deciding that Section 9(b)(3) was directed at plant guards, the Board observed that during the Senate debate of Section 9(b)(3), the employees to whom the Section would apply frequently were referred to specifically as "plant guards." [7] The Senate debate also made clear that Section 9(b)(3) resulted largely from the Supreme Court's decisions in Jones and Laughlin and Atkins, both of which involved plant guards.

Similarly, the Board noted, the Report to the original House bill explained the proposed supervisory exclusion of guards by stating that "plant policemen and guards prevent disorder and report misconduct of employees and of unions and their members." [8] The Board concluded that the overriding purpose of the legislation, both as proposed originally by the House and as passed, was

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[7] See, Cong. Rec., 80th Cong., 1st Sess. 6601, 6603, 6658 (1947).

[8] H. Rept. No. 245, 80th Cong., 1st Sess. 16 (1947) (emphasis supplied).

Congress' concern with the possibility "that if guards were included in production units, their loyalty to fellow union members might conflict with their duty to report to their employer derelictions of duty or violations of rules by fellow employees." (77 NLRB at 1186). In addition, the statutory language itself demonstrated its focus on plant guards. As the Board stated:

> Although it describes their duties as including enforcement of rules against "other persons" as well as against employees, this phrase, read with the phrase, "on the employer's premises," which appears in the same section, indicates that Congress was referring to employees and other persons who had access to the employer's premises. There are no references to men employed to guard, while transporting property belonging--not to their employer--but to customers of their employer. [77 NLRB at 1186]

C. The Board's Extension of Section 9(b)(3) To Armored Truck Drivers

In 1953, a differently constituted Board reversed this approach and held that armored car drivers who transport and guard property of customers of their employer did fall under the language of Section 9(b)(3). Armored Motor Service Company, Inc., 106 N.L.R.B. 1139 (1953). The employer in that case operated armored trucks to transport money and valuables for clients. The employees were bonded, deputized and armed guards. They spent 75 percent of their time on the armored truck picking up, transporting, guarding and delivering money and valuables. The remaining time was spent placing money in pay envelopes on the employer's premises, or standing guard on the customer's premises while pay envelopes were distributed to employees.

In reversing its earlier Brink's decision, which effectively limited Section 9(b)(3) to plant guards, the Board changed its mind about Congress' intent. It now felt that Congress had not intended to limit Section 9(b)(3) to apply only to plant guards. Observing that the statutory language contained no such restriction, the Board stated that it saw no basis for giving it so narrow a construction. (106 N.L.R.B. at 1140). It apparently ignored or rejected as a basis the very significant consideration that more employees would, under a narrow construction, be afforded full rights under the Act.

In the Board's view, while the danger of divided loyalty which Congress sought to eliminate was not as far reaching in the case of armored car guards as for plant guards, "it is, nevertheless, present." (106 N.L.R.B. 1140). It foresaw the potential for a conflict of interest problem, although one that differed dramatically from the problem articulated by Congress in the legislative history and addressed by its enactment of Section 9(b)(3). The Board described the conflict facing armored car drivers as follows:

> A conflict of loyalty could arise, for example, if the guards should be called upon to deliver money or valuables to one of their customers whose employees were on strike and picketing the premises of the customer. [Id.]

The Board's changed approach in Armored Motor Service followed a decision of the Third Circuit Court of Appeals in NLRB v. American District Telegraph Company, 205 F.2d 86 (1953). The Third Circuit refused to accept the Board's earlier finding that Section 9(b)(3) was limited to guards employed to protect property belonging to their own employer. The employer in that case installed and maintained security equipment for customers. Its armed guard employees investigated alarm signals from the customer's premises. In finding these employees to be statutory guards, the Court of Appeals reasoned that the word "the employer" in Section 9(b)(3) referred to employers in general, and not necessarily to the specific employer of the employees in question. This analysis was accepted by the Board in Armored Motor Service, which, however, went even further than American Dist. Telegraph in extending the reach of Section 9(b)(3). For, in American District Telegraph, the guard employees actually did their work on the customers' premises and thus functioned as plant guards. However, in Armored Motor Service, less than 25 percent of employees' time was spent on the customers' premises, with the remainder on the armored trucks engaged in transportation services.

D. The Board's Extension of Section 9(b)(3) To Unarmed Couriers

The reach of Section 9(b)(3) was extended even beyond Armored Motor Service, by the Board's 1976 decision in Brink's Inc., 226 N.L.R.B. 1182. At issue in that case was a contract unit of messengers, drivers, guards, and couriers. The guard status of the first three classifications was not in dispute, only that of the couriers. The Board found them also to be "guards."

Brinks performed transportation delivery services for customers with armored cars and ordinary vans. The former were used to carry cash and other valuables from commercial establishments to banks, while the latter were used to transport non-negotiable items between banks or bank branches. The armored cars were normally operated by at least two employees, a driver, messenger, and/or a guard. These employees were always in uniform and armed. The vans, however, were generally operated by a single courier who was unarmed. All employees, including couriers, wore identical uniforms, were subject to the same pre-hire investigation by the company for trustworthiness and honesty, were equally bonded, and were expected to protect the property entrusted to them. But the unarmed couriers were not required to resist theft with the "same vigor as armed employees." (226 N.L.R.B. 1183).

The General Counsel argued in Brink's, 226 N.L.R.B. 1182 (an unfair labor practice case), that the couriers were mere deliveryman and not statutory guards. The Board disagreed. [9] It rejected the General Counsel's reliance on the fact that the couriers were unarmed and transported non-negotiable instruments as placing too narrow a reading on the word "guard."

In reaffirming its Armored Motor Service view that the term "guard" applied to persons engaged in protecting property of an employer's customers, the Board in Brink's thus concluded that "the only issue presented is whether the couriers here protect property of the employer's customers." (226 N.L.R.B.at 1183) In answering that affirmatively, the Board observed that the couriers were entrusted with locked bags or pouches containing the customer's valuable property for safe and timely delivery; they were required not only to protect the employer's vehicle, but also the pouches, and to resist their theft; they might enter customers' property after closing hours and, when they did so, were responsible for securing the premises when they entered and exited; they underwent the same pre-hire investigation as the other guard employees, were subject to the same bonding requirements, worn identical uniforms, were required to adhere to the same work rules and regulations, worked under the same supervision and shared the same employee benefits. Moreover, there was some interchangeability of jobs between armored truck drivers and couriers once a courier obtained a gun permit.

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[9] That case arose in an unfair labor practice context and involved the legality of applying the contract's union security clause. A finding that all employees in the unit were §9(b)(3) guards presented a complete defense to the unfair labor practice charges. This was the first time that the Board had extended the definition of guards to unarmed couriers delivering non-negotiable paper, and it is strongly suggested that the decision may have been influenced by a desire to maintain the stability of the longstanding relationship found in that case. An opposite decision would have fragmented the existing unit.

In sum, the Board declined to adopt what it saw as "a restrictive interpretation of the rather plain meaning of the statute." 226 N.L.R.B. at 1184. Additionally, it expanded on its view, first expressed in Armored Motor Service, that the problem of conflict of loyalties which concerned Congress existed equally with respect to plant guards, armored truck guards, and now even unarmed couriers.

Then-Chairman Murphy disagreed completely with her colleagues' construction of Section 9(b)(3) as including armored truck drivers or couriers engaged in protecting the property of the employer's customers. In her view, the Board's original decision in Brink's, 77 N.L.R.B. 1182, correctly analyzed the scope and intent of Section 9(b)(3). Further, she believed that Armored Motor Service Company, 106 N.L.R.B. 1139, conflicted with both the language of Section 9(b)(3) and its legislative history and should be overruled. "The potential conflict of interest with which Congress was concerned does not exist when employees of armored truck companies are represented by a union which also represents nonguard employees of other employers." She reasoned as follows:

> Although it could be argued that a conflict of interest might arise if the employees of the armored car company were represented by the same union that represents the customer's production employees, I consider this possibility too speculative to deprive the armored car employees of their statutory right to be represented by a bargaining representative of their choice. [226 N.L.R.B. at 1186]

She thus urged a strict reading of Section 9(b)(3) -- excluding from its coverage armored car drivers and couriers -- soundly reasoning that it is a basic precept of legislative interpretation that laws which are restrictive in nature, such as Section 9(b)(3), should be strictly interpreted. [10/]

[10/] Conversely only those laws which are permissive in nature may be loosely interpreted. In support, Chairman Murphy cited Sec. 5814 and 5818, Sutherland Statutory Construction, 3d ed.

(Footnote Continued)

II.

APPLICATION OF SECTION 9(b)(3) GUARD STATUS TO EMPLOYEES ENGAGED IN TRANSPORTATION FUNCTIONS IS REPUGNANT TO THE OVERALL PURPOSE OF THE ACT

The Board has reiterated its 1976 Brinks ruling. For example, in three separate cases it held that Purolator Courier employees in different parts of the country were guards, thereby precluding these employees' attempts to become represented by Teamster local unions. 11/ Indeed, Teamster locals receive constant requests for representation from employees like Purolator's. As the law stands now, we must turn them away.

The practical effect of §9(b)(3) is that, because the Board cannot certify a "mixed guard" union, it also will not entertain a petition for a representation election filed

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(Footnote Continued)

Chairman Murphy's analysis was echoed by Chief Judge Bazelon in his dissenting opinion in Teamsters, Local 71 v. NLRB, 553 F.2d at 1377, where he stated that "§9(b)(3) marks an extremely narrow exception to the National Labor Act's general policy of employee free choice." By contrast, the Board has allowed the exception to swallow up the rule.

11/ Purolator Courier Corp., 254 NLRB 599 (1981) (Texas-Oklahoma Region); Purolator Courier Corp., 265 NLRB 659 (1982) (Memphis); and Purolator Courier Corp., 266 NLRB 384 (1983) (northeast region). See Local 851, IBT v. NLRB, 732 F.2d 43 (2d Cir. 1984) which upheld the Board's guard analysis as to Purolator.

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by such a union. [12] While a guard employer may voluntarily recognize a mixed-guard union, the Board will not compel it to do so _de novo_ [13] or to maintain a long established relationship, voluntarily created. [14] The Board has also held that because a mixed-guard union cannot be certified, it can not engage in economic action to compel recognition without running afoul of §8(b)(7)'s ban on recognitional and organizational picketing. [15] In short, employees treated as guards are deprived of the full organizational and bargaining rights afforded by the Act to all other employees. In

order to enjoy the full rights associated with a Board certification, they are restricted in their choice of a bargaining representative to a guards-only union. Particularly in the case of employees engaged in transportation services, this denies them effective representation. Guard unions, generally speaking, lack economic power. They cover limited groups of employees and lack sufficient resources to enable them to act as an effective bargaining agent or to seek to negogiate the kinds of benefits regularly bargained for by other unions.

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[12] Until recently, the Board would allow such a union to intervene in an election based on a petition filed by a guard union. If it won the election, the Board would certify only the arithmetical results. _Bally's Park Place_, 257 NLRB 777. The Board no longer will allow such intervention. _Univ. of Chicago_, 272 NLRB 873 (1984).

[13] See _Teamsters Local_ 71 v. _NLRB_ 553 F.2d 1368, 1376 (D.C. Cir. 1977) and cases cited at n.30.

[14] _Wells Fargo Armored Service Corp._, 270 NLRB 787.

[15] _Drivers, Chauffeurs & Helpers Local 639_ (_Dunbar Armored Express_) 211 N.L.R.B. 687 (1974); _Teamsters Local 71_ v. _NLRB_, 553 F.2d 1368.

In progressively expanding the definition of "guard" the Board has lost sight of the express general policy of the Act to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing..." Section 1, NLRA, 29 U.S.C. §151 (emphasis added). Instead of properly construing the §9(b)(3) exception to this policy narrowly, the Board has stretched it untenably, far beyond its language and purpose, and without any practical necessity. For the alleged divided loyalties problem is a pretext only.

Section 9(b)(3) is directed at persons who "enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." Since the underpinning of the provision is rule enforcement -- the function of plant guards -- then employees with no such responsibility properly should not be subject to the Section's restrictions. Neither armored car drivers nor Purolator's couriers, for example, enforce, or have authority to enforce, any rules against any persons, including customers' employees. Contrasted with plant guards who are on the premises, they have little if any contact with customers' employees. The Board has however ignored the absence of rule enforcement authority and instead has focused on whether the employee have a duty to protect property of the employer's customers which they transport. This analysis totally misses the point.

Not only do these employees have no rule enforcement authority, they also have no special security role beyond safe transport of property. Their principal function is transportation, driving their trucks and picking up and delivering their orders. Their responsibility for the protection of the packages entrusted to them is hardly unique. All truck drivers are responsible for the trucks and commodities entrusted to them. All have some access to customer property in pickup and delivery. If the sole factor determinative of guard status is protection of customers' property, then all drivers handling valuable commodities must be viewed as guards. The obvious absurdity of this proposition demonstrates the unreasonableness and arbitrariness of the Board's treatment of these employees as guards. There simply is no logical reason to treat Purolator Couriers as guards when UPS drivers are not. Nor is there any difference between non-guard common carriers of coins, silver bullion and other valuable metals and armored car carriers.

As the Board recognized in its first Brinks decision, 77 NLRB 1182, the dominant purpose of §9(b)(3) was to ensure to management loyal plant production personnel during strikes or other disorders to enforce rules and report misconduct of employees. This purpose is spelled out in the House Report on the original House Bill. [16] Regardless of the present validity of the divided loyalty concern with respect to plant guards, it is clear that this concern is nonexistent with respect to employees performing transportation services. They have no authority or job duty comparable to rule enforcement during strikes, and they spend little time on the premises.

In 1977, Brinks testified on this subject:

> "Armored car companies are not hired to protect the plants of their customers. As distinguished from organizations which provide plant guards or security guards for their customers, armored car drivers and helpers are engaged in transportation and are on the premises of the customer for only a short period of time while they are picking up the property to be transported. They are not sent to the customer's premises to protect his plant or to enforce rules against the customer's employees."

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[16] H. Rept. No. 245, 80th Cong., 1st Sess 16 (1947).

> 1977 Labor Reform Act Hearings, supra, at 590 (copy attached).

As to these employees, however, the Board articulated a potential conflict of interest which differs dramatically from that addressed by Congress. It hypothesized that unarmed couriers, or armored truck drivers, might have to face a picket line by employees of the customers. Thus if they were members of the same union as the customers' employees, the drivers might have divided loyalties.

What the Board has equated with a conflict of loyalty is the exercise of the §7 protected right to respect a picket line. This is irrelevant to the purpose of Section 9(b)(3). Whether or not the drivers are members of the same union as the customer's employees, the drivers, as trade unionists, would be expected to honor the picket line of members of another union. The right to engage in sympathetic action is a basic right protected by the Act.

Further, the same alleged divided loyalty confronts all drivers. Yet, the Board has somehow decided that drivers of certain types of vehicles, carrying certain kinds of property, would be disloyal for honoring a picket line, whereas others are engaged in protected §7 activity. If this conflict of loyalty had been what Congress had in mind in enacting §9(b)(3), then all drivers could be considered guards because they frequently confront picket lines.

In addition, the guard classification of these employees do not eliminate the potential for an alleged conflict of loyalty between them and the customer's striking employees. For it could be the customer's plant guards who are on strike. Also, courier services and armored car companies have employees primarily engaged in transportation and others who remain on the premises to guard the plant. If couriers are restricted to a guards-only union, they will be placed in the same category as their employer's plant guards. Thus, as to that employer, Section 9(b)(3)'s purpose would be defeated. If the driver-guards were to strike, the plant guards would confront the torn loyalties which Congress did address. This is not an insignificant factor for a company -- Purolator, for example -- which has a substantial facility of its own.

In sum, the Board's analysis of the conflict of loyalties problem strays far from the problem addressed by Congress. It yields no security advantage, and, at the same time, deprives thousands of employees of full enjoyment of the Act's rights and benefits. The Board draws inappropriate distinctions between armored car and express courier services and the trucking industry in general. All of these drivers who transport valuable cargo have comparable duties and property protection responsibilities. There is no practical necessity for treating them differently. There simply is no evidence that the conflict of loyalty problem feared by the Board has materialized. The Board has never cited any such evidence, and we know of none. Even if an odd incident here or there can be cited, this hardly justifies the Board's overall approach. Experience demonstrates that employees will do their jobs regardless of what union represents them. Security concerns, if any, can be dealt with in collective bargaining agreements, and employees can be disciplined if they fail to do their jobs because of fraternal solidarity with a suspect. And whether they are in a guards-only union or a mixed union, armored car drivers and couriers, like other truck drivers, lawfully may respect picket lines at customer premises.

It is significant that law enforcement personnel are throughout the country entitled under many state laws to be represented by a union of their own choosing. In fact, thousands are represented by Teamster local unions and other unions whose membership is not limited to police officers. If there is no divided loyalty problem perceived in that context, then as to armored car drivers and unarmed couriers the issue is not a real one. The Board accomplishes only one thing: the restriction totally without cause or rational basis under the law, of organizational choice. S.1018 would correct this problem and restore §9(b)(3) to its original intent.

The problem is not divided loyalties. Divided loyalties is a pretext designed to mask the real issue. The problem, as discussed, is one of economics, substandard wage competition by non-union companies. It was this competition that forced Brinks and other companies to curtail operations and then to abrogate relationships outright with the Teamsters. Brinks itself described this competitive pressure when it testified before this Committee in 1977. At that time it agreed that armored car drivers were not properly "guards" under §9(b)(3) and that the conflict of loyalties problem was a mere fiction. Their testimony is most instructive and confirms our position. A copy is attached hereto for the record.

"Divided loyalties" has been used as the legal justification for union avoidance in this industry, and it should be so recognized. The purpose of §9(b)(3), to shield guard employers from potential conflicts of loyalties, has been exploited for reasons wholly unrelated to security or protection. This shield has become a Sword of Damocles ever threatening to extinguish employees' collective bargaining rights and benefits and to destabilize labor relations in entire industries. Destroying statutory rights of thousands of employees merely to protect an employer from a speculative and highly unlikely conflict of loyalties distorts §9(b)(3), exalting it over the general statutory design and policy.

It is clear that when Wells Fargo terminated its longstanding relationship with Teamsters Local 807, it did so for reasons unrelated to the security purpose of §9(b)(3). Economic reasons motivated its action -- i.e., the Union's refusal to accept its final contract offer. Wells Fargo's attempts to justify its conduct on divided loyalties grounds were completely discredited by the Administrative Law Judge as afterthoughts and pretexts. Moreover, he concluded that the alleged "conflicts" did not withstand scrutiny; no actual or potential conflict was demonstrated. 270 N.L.R.B. at 797, 800. See also Truck Drivers Local Union No. 807 v. NLRB, 755 F.2d at 15.

Nonetheless, as discussed above, the Board permitted Wells Fargo to withdraw recognition legally, using §9(b)(3) as a defense. Member Zimmerman dissented, concluding that the result was "not only far beyond either the words of Section 9(b)(3) or its legislative history, it envisions a form of collective bargaining that is foreign to the statute as a whole." 270 N.L.R.B. at 793. In his view, narrow readings of §9(b)(3) find support in the legislative history, but an enlarged scope, as framed by the Board, was without any such support. The Board's decision was affirmed by the Second Circuit Court of Appeals over a strongly worded dissent by Judge Mansfield. He found the decision

> "not only fundamentally unfair to the employees but contrary to the Act's basic policy of encouraging stability in labor relations. It is particularly unfortunate when one considers the hesitancy with which the term 'guards' (originally referred to as 'plant' guards because of the potential conflict faced by them in enforcing their employer's rules against co-employees who are members of the same union) was extended to 'armored car employees' who are not employed to protect the employer's property under such circumstances but to protect the property of customers." 755 F.2d at 15-16.

S.1018 will not directly overrule Wells Fargo or undo all of its drastic consequences. It will, however, narrow considerably the universe of employees subject to the restrictions and liabilities of §9(b)(3). Fewer unrepresented employees will be limited in their organizational choices and fewer industries will be privileged to destablize labor relations by unilateral termination of established relationships. Without S.1018, more and more employers may attempt to use §9(b)(3) to characterize their employees as guards and then rid themselves of unions. Section 9(b)(3) is a narrow, minor provision of law. It has been applied broadly and exploitatively. S.1018 will limit such abuse, while protecting employers' right to have loyal plant protection personnel.

(EDITOR'S NOTE: Due to printing limitations and in the interest of economy, some previously mentioned additional material accompanying this statement was retained in the files of the committee, where it may be researched upon request.)

Senator **Nickles**. Ms. Liebman, thank you very much for your comments. Mr. Hucke, do you happen to know how many Teamsters your local had in members?

Mr. **Hucke**. Yes, sir; Senator, all armored car and one courier, 1,000 members. We do not have any today.

Senator **Nickles**. Do you have a local today?

Mr. **Hucke**. Yes, sir, we do, on paper.

Senator **Nickles**. But no members?

Mr. **Hucke**. That is correct.

Senator **Nickles**. Are most of those 1,000 former Teamsters now members of another union?

Mr. **Hucke**. No, sir, they are not. They are not at all. They talk about guard union organizing them. I have not seen it.

Senator **Nickles**. Ms. Liebman, do you have an idea of the number the Teamsters have lost nationwide?

Ms. **Liebman**. Over the years, I would say the figure is probably something between 10,000 and 15,000. The number of people employed in the——

Senator **Nickles**. Is this going back 5 years or 10 years?

Ms. **Liebman**. Well, over the last 5 to 10 years. The number of people employed in the industry contracted because of the nonunion competition, and then since the Board's decision——

Senator **Nickles**. There are less armored cars working now or just the number of unionized people?

Ms. **Liebman**. The number of armored cars has decreased. There is an expanding use of the courier services and they were a competition to the armored car companies. I think Brinks itself testified to this in 1977. But the industry contracted and then since 1984, when the Board validated what Wells Fargo did, the rest of the industry has now followed suit.

Senator **Nickles**. It has happened on a much rapid scale since 1984?

Ms. **Liebman**. That is right. Once the contract expires, the companies seem to be withdrawing recognition, not in every single case but almost universally. Brinks itself was almost entirely unionized. It is now on the way to becoming nonunion as far as their drivers and they employed at one time probably a good 4,000 Teamster members.

Senator **Nickles**. This question comes from Senator Hatch: One of the primary objections to the bill's concern over the issues is divided loyalty, which has been mentioned. A guard belonging to a craft union who would refuse to cross that union's picket line during a strike, obviously if a company was unable to move money in and out of its facility during a strike, the whole tenure of labor dispute might change. Is this situation possible under the law today and, if so, how do the companies and the unions address that?

Ms. **Liebman**. I think Mr. Hucke would like to address that.

Mr. **Hucke**. I can answer that for you, Senator. I cannot answer for the country, but I can answer for Chicago, the greater metropolitan area. We have operated many years with armored cars represented in our local and we have always had an understanding: Where there was a strike, Teamster or any other union, the trucks are equipped with radios, the messenger would call immediately to

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the company, to the dispatcher, they in turn would get hold of the joint council of that area and we would have the messenger—I have proof positive here of documents—we would have the messenger go up to where the strike was happening, go into where the person that handled the money is, and escort him out to the truck, and get into the safe, and sign a receipt for it.

So when they say there is disloyalties, that is not true, because if a strike went or a labor dispute went for any length of time, the amount of money petered down to nothing anyway, but we always made the stop where there was no disloyalty to the customer that the company had.

Senator NICKLES. The Teamster member would not cross the picket line?

Mr. HUCKE. He would cross the picket line after he called the company and we contacted the council. No matter what union it is, they went by those standards, and I have all different documents of proof of how it has been done for years in Chicago.

Senator NICKLES. They would cross the picket line or they would have management bring the money out?

Mr. HUCKE. Sometimes they would cross it and sometimes it depended on who the picket captain was or they would have management bring the money to the truck or the messenger escort him, give him a guard and put that money into a safe that was in the truck.

Senator NICKLES. Did you ever have problems of losing that money or individuals being roughed up or anything if you had management carrying the money out?

Mr. HUCKE. No, sir; and I am second generation in this Teamsters Union, between my father and myself there is 90-some-odd years of seniority and in that amount of time we have never had any disturbance of that type.

Senator NICKLES. Ms. Liebman, does your union currently represent any employees who transport money, and valuable bullion, or other notes, and securities?

Ms. LIEBMAN. Yes; as I mentioned, a gentleman is here today who is employed by Yellow Freight Co. He transports coins from the Denver Mint to Brinks. He is one of many such members, transporting not only coins but other valuable commodities, liquor, furs, metals, whatever, and these people transport these goods without any security or conflict of loyalties problem and they are not treated as guards.

Senator NICKLES. Federal employees would not have the right to strike the mint, would they?

Ms. LIEBMAN. Federal employees probably would not have the right to strike a mint.

Senator NICKLES. So you wouldn't get into that kind of a conflict, I do not think, would you?

Ms. LIEBMAN. Well, the gentleman who works for Yellow Freight is not a—oh, I see what you mean, he would not encounter it. But he delivers to Brinks itself and then the theory at the moment is once the money leaves Brinks it cannot be carried by a Teamster.

Senator NICKLES. I hear you. Thank you very much. We appreciate this panel's cooperation.

On our next panel is Mark de Bernardo, manager of labor law for U.S. Chamber of Commerce; David Yost, president of Metropolitan Armored Car; Jeffrey Pagano, labor counsel for Brinks, Inc.; and Melvin Bailet, senior vice president of Magne Nickless, representing the National Armored Car Association.

Mr. Yost, please begin.

STATEMENT OF DAVID W. YOST, PRESIDENT, METROPOLITAN ARMORED CAR, INC.; JEFFREY W. PAGANO, COUNSEL, BRINKS, INC.; MAX A. DE BERNARDO, MANAGER OF LABOR LAW, U.S. CHAMBER OF COMMERCE; AND MELVIN E. BAILET, SENIOR VICE PRESIDENT, MAYNE NICKLESS, INC

Mr. Yost. Thank you, Senator. My name is David W. Yost. I am founder and president of Metropolitan Armored Car, Inc., an independent armored car company in the Columbus and Dayton, OH, areas. I am also appearing here before the committee this morning in behalf of the Independent Armored Car Operators Association, which consists of more than 40 privately held armored car companies operating from the east coast as far west as Guam.

Speaking as the president of Metropolitan Armored Car and as the designated representative of IACOA, I wish to register my strong opposition to S. 1018 and any other bill that would amend section 9(b)(3) of the National Labor Relations Act. To eliminate its application to armored car guards would be wrong.

S. 1018 somehow presumes that heavily armed persons, whose duty it is to transport millions of dollars daily from one point to another using armored vehicles—persons who are attacked and sometimes killed by common criminals, members of organized crime, and terrorists—are not guards.

In other words, a uniformed individual walking into a bank armed with a .38 caliber pistol, a canvas bag full of money, backed up by someone holding a 12-gauge shotgun sitting inside a bulletproof enclosure, would not be considered a guard under this legislation. Yet, an unarmed person standing at the gate of a factory checking lunch pails for stolen tools would be considered a guard. S. 1018, in my opinion, reflects a serious misunderstanding of the realities of the security industry.

Section 9(b)(3) addresses a special situation in which a guard employee's duty to his employer comes into conflict with his duty as a union member, creating security dangers.

That danger is the threat of divided loyalty. The threat of divided loyalty is a very real concern in the armored car industry because armored car guards come into contact with the employees of many different kinds of unions during the course of their workday.

We have already seen instances of divided loyalty situations in the armored car industry in the Columbus area. Several years ago, the Brinks Armored Car Co. voluntarily recognized the Teamsters as the exclusive bargaining agent of the employees in Columbus. On several occasions, our company was contacted by businesses requesting our services who were normally served by Brinks. In each of these cases, the company's employees were on strike and had established picket lines that the Brinks guards refused to cross. Our messenger guards who were not represented by the Teamsters were able to cross the picket lines and make the pickup. This is precisely why section 9(b)(3) was enacted, to ensure that during labor disputes guard employees would not be swept into the dispute because of obligations to the union on strike.

When introducing S. 1018, Senator Gorton stated that armored car guards "are being denied the fullest freedom in the exercise of their rights to labor organization and collective bargaining." We are very concerned that this statement may lead the casual observer to conclude that armored car guards are barred from union activities protected by the National Labor Relations Act. Such a conclusion would be a serious misrepresentation of existing law.

For example, the armored car guards in my Dayton office were organized by the United Plant Guard Workers of America in 1982, joining Amalgamated Local 166, which the National Labor Relations Board certified as the exclusive bargaining representative of our employees. The employees of other members of the IACOA are also represented by guard unions which have been certified by the NLRB.

We also wish to address the contention made by Senator Gorton that armored car guards are not really guards either under section 9(b)(3) or in practice. The people that we hire to protect the millions of dollars that we transport each day are guards in my own personal opinion and in the opinion of the NLRB, courts, and members of this committee in 1978. We seek out as employees those with security backgrounds who are familiar with weapons handling. We regularly hire ex-military policemen, retired military personnel, ex-law enforcement officers, and others with a background in the security field, individuals who are accustomed to the risks of guard duty.

When advertising for personnel, the advertisement is always placed under the category of "security," with the further designation of "driver guard, messenger guard," or just plain "guard." Obviously, the people who respond to these advertisements consider themselves to be guards and are hired on that basis.

It should also be emphasized that the State of Ohio considers my employees to be guards. Each is registered by the Division of Licensing of the State Department of Commerce as an investigator and security guard. In addition, the Ohio Peace Officer Training Council has established a firearm training program that all my employees must undergo. It consists of 20 hours of instruction in the use of handguns and 4 additional hours in handling shotguns in situations requiring deadly force.

With the rising cost of liability insurance and the dramatic increase in jury awards, would we carry weapons of any kind if we were not guarding something or someone?

In conclusion, S. 1018 in my opinion would expose a vital industry to threats of labor unrest and corruption that could paralyze the American economy. We urge this committee to reject S. 1018.

Thank you.

[The prepared statement of Mr. Yost follows:]

METROPOLITAN ARMORED CAR, INC.

162 North Sixth Street • Post Office Box 42 (43216)
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STATEMENT OF

DAVID W. YOST

ON S. 1018

BEFORE THE

SENATE SUBCOMMITTEE

ON

LABOR

April 24, 1986

• *Courier and Related Services to most major cities* •

My name is David W. Yost. I am the founder and President of Metropolitan Armored Car Inc., an independent armored car company serving the Columbus and Dayton, Ohio, metropolitan areas. I am also appearing before the Committee this morning on behalf of the Independent Armored Car Operators Association (IACOA), which consists of more than 40 privately-held armored car companies operating from the East Coast as far west as Guam. Speaking as the President of Metropolitan Armored Car and as the designated representative of the IACOA, I wish to register my strong opposition to S. 1018 and any other bill that would amend section 9(b)(3) of the National Labor Relations Act (NLRA) to eliminate its application to armored car guards.

Section 9(b)(3) is a law which represents a common sense approach to labor relations in the security industry. It states that guards are free to form themselves into labor organizations certified by the National Labor Relations Board and engage in collective bargaining activities as long as the organizations consist exclusively of guards and are not affiliated with any other union which admits into membership persons other than guards. The design of section 9(b)(3), as stated by the Court of Appeals for the District of Columbia Circuit, is "to minimize the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer against a fellow union member . . . . " Drivers, Chauffers, Warehousemen and Helpers, Local No. 71 v. NLRB, 553 F.2d 1368 (D.C. Cir. 1977).

The sponsors of S. 1018 recognize the need to provide protections against divided loyalty. Senator Gorton, the primary sponsor, has himself said that section 9(b)(3) is an "appropriate measure designed to minimize the danger of divided loyalty . . . . " Unfortunately, S. 1018 would restrict application of the section to plant guards, and not armored car guards and other types of security employees found to be guards by the National Labor Relations Board.

S. 1018 somehow presumes that heavily armed persons whose duty it is to transport millions of dollars daily from one point to another using armored vehicles -- persons who are attacked and sometimes killed by common criminals, members of organized crime and terrorists -- are not guards. In other words, a uniformed individual walking into a bank armed with a .38 caliber pistol, a canvas bag full of money, backed up by someone holding a twelve guage shotgun sitting inside a bulletproof enclosure, would not be considered a guard under this legislation. Yet, an unarmed person standing at the gate of a factory checking lunch pails for stolen tools would be considered a guard. S. 1018, in my opinion, reflects a serious misunderstanding of the realities of the security industry.

The Threat of Divided Loyalty

The purpose of section 9(b)(3) is to insulate guard employees from situations that would force them to split their allegiance between the employer and the union during periods of labor unrest. Workers who are members of a union have an obligation to adhere to the policies, rules and regulations formulated by the union and can be fined and disciplined for not doing so. On the other hand, workers who are guards have an obligation to their employer to protect property and carry out other security responsibilities. Section 9(b)(3) addresses a special situation in which a guard employee's duty to his employer comes into conflict with his duty as a union member, creating security dangers.

The threat of divided loyalty is a very real concern in the armored car industry because armored car guards come into contact with the employees of many different kinds of unions during the course of their workday. One of the principal shortcomings of S. 1018 is its allowing a guard local to affiliate with an international union that represents non-guard employees. If a union such as the Teamsters were to organize my employees, they would be faced constantly with divided loyalty situations. The Teamsters are used as an example here because of their strict requirements regarding the support of affiliated unions who are on strike. The Teamster constitution makes specific provision for disciplining Teamster members who cross picket lines set up by other Teamster locals. Thus, whenever one of my trucks approached a company that had a Teamster picket line in front of the entrance, it can only be expected that the guards would have no other option but to refuse to cross the picket line to make a pickup or delivery.

We have already seen instances such as this in the Columbus area. Some armored car companies have voluntarily recognized non-guard unions such as the Teamsters, and nothing in section 9(b)(3) prevents them from doing so. Several years ago, the Brinks armored car company had its Columbus employees represented by the Teamsters. On several occasions, our company was contacted by businesses requesting our services who were normally served by Brinks. In each of these cases, the company's employees were on strike and had established picket lines that the Brinks guards refused to cross.

This is precisely the reason that section 9(b)(3) was written nearly forty years ago. Its sponsors were concerned that in a labor dispute, the guards should have no other allegiance than to their employer. By prohibiting guard unions from affiliating with nonguard unions, section 9(b)(3) assures employers that their guard employees will not be drawn into the labor disputes of affiliated unions with whom they come into contact in the course of their duties.

My company is responsible for the transportation of millions of dollars daily in Ohio. It is essential that the flow of this money not be interrupted by the refusal of our company's armored car guards to cross picket lines of affiliated unions. Many of the businesses that we serve handle large amounts of cash on a regular basis. If we were prevented from removing those funds from the site each day, extremely serious security implications would develop. Enactment of S. 1018, therefore, could lead to the unnecessary interruption of currency transfers in the United States and place the security of those funds at additional risk.

The Right To Engage in Union Activities

In our opinion, employees should be given every right to engage in union activities, but only so long as the security of the company's employeec and the assets of the company are not placed at risk. Section 9(b)(3) has provided those protections for over 30 years in the armored car industry, and labor relations have been far more stable than they would be should S. 1018 be enacted.

When introducing S. 1018, Sen. Gorton stated that armored car guards "are being denied the fullest freedom in the exercise of their rights to labor organization and collective bargaining." We are very concerned that this statement may lead the casual observer to conclude that armored car guards are barred from union activities protected by the National Labor Relations Act. Such a conclusion would be a serious misrepresentation of existing law.

Under section 9(b)(3) as it is currently written, armored car guards have the fullest freedom to exercise their rights to organize and bargain collectively as long as section 9(b)(3)'s conditions regarding membership and affiliation are met. For example, the armored car guards in my Dayton office were organized by the United Plant Guard Workers of America in 1982, joining Amalgamated Local 166, which the National Labor Relations Board certified as the exclusive bargaining representative of our employees. The employees of other members of the IACOA are also represented by guard unions which have been certified by the NLRB.

Armored Car Employees Are Guards

Members of the armored car industry take strong issue with Senator Gorton's assertion that armored car employees are not guards either in law or practice.

When introducing S. 1018, Senator Gorton asked how armored car guards differed from truck drivers safeguarding valuable cargo. The answer depends upon a complete assessment of the duties of the type of employee in question. Congress in enacting section 9(b)(3) did not specify that plant guards were the only employees to be considered guards; rather, it used the word "guard" without adjectives. Congress then delegated the responsibility of defining the types of employees to be considered guards to the National Labor Relations Board.

After nearly forty years of litigation of the question, it has been conclusively established in law that the duties of individuals employed to protect currency and other valuables while being transported from one location to another are guards under section 9(b)(3). All Boards and courts ruling on this question since the NLRB's decision in Armored Motor Express in 1953 have reached this conclusion. I take strong issue with Senator Gorton's assertion that the "NLRB's rulings cannot stand against the clear intent of Congress." As stated by the Court of Appeals for the District of Columbia, nothing in the legislative history of section 9(b)(3):

> evinces an intent to limit the application of Section 9(b)(3) to plant guards. Presumably, so fundamental a restriction would have found expression in the statutory language of the provision.

The fact of the matter is that the NLRB's rulings have withstood the test of time, having been the same in Republican and Democratic administrations alike.

Armored car employees are also clearly guards according to any common sense definition of the term. Section 9(b)(3) states that a guard is "any individual employed as a guard to enforce against employees and other persons rules to protect property." The individuals that my company hires are responsible for safeguarding literally millions of dollars which we transport each day. My employees are armed, uniformed, bonded, and must pass rigorous security checks prior to and during their employment. As part of their uniform, each one carries a .38 caliber handgun, and if deemed necessary shotguns are carried in the cab of the armored car. One of the rules under which we operate is that "other persons" are to be prevented from stealing or damaging the funds and property which we transport. That rule is enforced by using, if necessary, deadly weapons.

Because of the nature of an armored car guard's duties, we seek out as employees those with security backgrounds who are familiar with weapons handling. We regularly hire ex-military policemen, retired military personnel, ex-law enforcement officers and others with a background in the security field. When advertising for personnel, the advertisement is always placed under the category of Security with the further designation of Driver Guard, Messenger Guard, or just plain Guard. Obviously, the people who respond to these advertisements consider themselves to be guards and are hired on that basis.

It should also be emphasized that the State of Ohio considers my employees to be guards. Each is registered by the Division of Licensing of the State Department of Commerce as an Investigator and Security Guard. In addition, the Ohio Peace Officer Training Council has established a firearm training program that all of my employees must undergo. It consists of twenty hours of instruction in the use of handguns and four additional hours in handling shotguns in situations requiring the use of deadly force. With the rising cost of liability insurance and the dramatic increase in jury awards, would we carry weapons of any kind if we were not guarding something or someone?

Protections Against Improper Influence

Nearly every dollar that moves in interstate commerce not carried by individuals is transported by armored car. The sums of money carried each day by all of the armored car companies in America would number in the billions of dollars. There are also billions of dollars worth of currency, food stamps and precious metals lying in the vaults of armored car companies. The security of the financial system in our country, therefore, depends to a large extent on the security of the armored car industry. Any action that Congress takes making a fundamental change in the day-to-day operations of that industry deserves to be scrutinized very carefully to determine whether there are potentially adverse implications of that change.

It is no secret that the reason for this legislation and for the hearing today is that the International Brotherhood of Teamsters wants the legal authority to organize the armored car industry in the United States. This Committee is also aware of a report recently issued by the President's Commission on Organized Crime called "The Edge: Organized Crime, Business and Labor Unions." That report states categorically that some portions of the IBT are substantially influenced and controlled by organized crime. Before S. 1018 is considered further, therefore, the members of the Independant Armored Car Operators Association urge this committee to conduct a thorough review of S. 1018 in light of the Commission's report and legislative recommendations. One of the key findings in that report is that organized crime has used labor unions as a tool to obtain monopoly power over certain markets. I am sure that all members of the Committee would be unwilling to support any legislation that would increase the power of organized crime, particularly over the industry responsible for the safe transportation and keeping of the nation's currency.

Conclusion

That armored car guards are guards has been a practical and legal axiom for more than thirty years. S. 1018, in contrast, would create the legal fiction that an employee whose principal function is to protect highly valuable materials from theft while being transported and/or stored is not a guard. In creating that fiction, S. 1018 would expose a vital industry to threats of labor unrest and corruption that could paralyze the American economy. We urge this Committee to reject S. 1018.

Senator **Nickles**. Mr. Yost, thank you very much for your comments and statement. We are pleased that Senator Wallop has joined us as well.

Do you have any comments?

Senator **Wallop**. Mr. Chairman, I do not have a statement. I am interested in this legislation. I really cannot understand the point of view that was just articulated as yet.

Senator **Nickles**. Thank you, Senator Wallop.

Our next panelist is Mr. Pagano, representing Brinks, Inc.

Mr. **Pagano**. Brinks operates throughout the United States and is a member of the National Armored Car Association. I am here today speaking on behalf of Brinks and wish to extend our appreciation for the opportunity. I would request that my statement, which has already been submitted, regarding S. 1018 be placed in the record.

Brinks is engaged in the business of guarding, transporting, and enforcing safety and security rules of Brinks and its customers. Our customers include all types of retail and wholesale operations, manufacturers, financial establishments, and the Federal Reserve. Brinks serves as a vital link in the Nation's money supply system.

Brinks employs persons as guards and nonguards, as defined by the National Labor Relations Board. Brinks employees who are nonguards are usually represented by the Machinists and the International Brotherhood of Teamsters. Our guard employees, which include our armored vehicle employees, perform guard functions in our own premises and that of our customers up to 70 percent of their working time.

S. 1018 would rewrite the legislative history of section 9(b)(3) under the guise of merely placing the word "plant" before the word "guard." The proponents of S. 1018 assert that this change would restore full organizing rights for certain employees who are considered bailees.

I wish to point out that the definition of a guard under the National Labor Relations Act is irrelevant to the concept of a bailee, which is a creature of State law. Armored vehicle guards have many additional obligations regarding safety and security such as the duty to defend which could require the use of deadly weapons to ensure the public safety and security.

The assertion that armored vehicle employees only enjoy second-class rights as American workers is erroneous. Section 9(b)(3) merely separated for the public interest certain unions from other unions. Section 9(b)(3) did not deny guard unions any rights possessed by nonguard unions whatsoever. In fact, it assured guard unions that they possess the very same rights to engage in organizing and collective bargaining as nonguard unions under the National Labor Relations Act.

Brinks elected to assert its right to withdraw its voluntary recognition of certain nonguard unions as provided by Congress in section 9(b)(3) because the divided loyalty dilemma had caused security related problems for oue employees and customers.

Congress recognized that the passage of 9(b)(3) in 1947 would result in a temporary disruption of existing bargaining relationships which were previously certified as appropriate by the Board at the time.

Congress balanced this one-time disruptuion for employees, employers, and customers against the public policy objective concerning divided loyalty. Congress determined that the disruption was outweighed by the public policy promoted under section 9(b)(3).

There has simply not been any expansionary interpretation of section 9(b)(3) by the National Labor Relations Board as it relates to armored vehicle guards. Both the Board and the Federal courts have been consistent in this regard except for one decision in over a 35-year period.

S. 1018 would ignore the divided loyalty dilemma as affects armored vehicle guards, while at the same time would preserve the distinction or the protection for plant guard employers and employees. There is simply no distinction between the armored vehicle guards and plant guards except that armored vehicle guards are more mobile. It is this very mobility that increases the conflict of loyalty dilemma which is the precise reason armored vehicle guards should remain within the framework of section 9(b)(3).

I would like to thank you for this opportunity to state our views concerning S. 1018.

[The prepared statement of Mr. Pagano follows:]

Statement
by Jeffrey W. Pagano, Labor Counsel
for Brink's, Incorporated
on S.1018 before
the Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate

My name is Jeffrey W. Pagano and I am labor counsel for Brink's, Incorporated, headquartered in Darien, Connecticut, which does business throughout the United States. I appreciate the opportunity to testify on behalf of Brink's on Senate Bill 1018, the "guard bill."

Brink's is engaged in the business of protecting, transporting and guarding the property of Brink's and its customers, enforcing the rules of Brink's and its customers in protecting the property and safety of persons on its own premises as well as its customer's premises, including the public. Our objective is to provide a guard service for Brink's at our own locations and a guard service for our customers while we are on their premises. Our customers include retail and wholesale operations, manufacturers, commercial banks, other financial establishments and the Federal Reserve. Like other armored car companies, Brink's serves as a vital link in the nation's money supply system.

S.1018 would, if passed, raise the real possibility of a divided-loyalty conflict that could jeopardize the ability of Brink's to perform its objective of ensuring security and safety for itself, its employees and its customers. It is for this reason that Brink's opposes the bill.

As proposed, S.1018 is an attempt to exclude from the scope of Sec. 9(b)(3) armored vehicle employees. The proposed legislation would overrule the National Labor Relations Board and the Federal Courts which have uniformly held, for 32 years, that armored vehicle employees are within the meaning and spirit of Sec. 9(b)(3).

The proponents of S.1018 assert that the Board has expanded Sec. 9(b)(3) beyond the intent of the framers and that S.1018 will correct this alleged 32-year misapplication of the statute. Brink's strongly believes that the Board and the Federal Courts have clearly understood the policy issues envisioned by Sec. 9(b)(3), have consistently been faithful to its objectives and that it should not be overruled.

The Federal Courts of Appeal in the District of Columbia, the Seventh Circuit and the Second Circuit have addressed the very argument raised by the proponents of S.1018 and have rejected it on the grounds of the legislative history of Sec. 9(b)(3), noting that to limit its application to plant guards would be a fundamental limitation that would have found expression in the language of Sec. 9(b)(3). Drivers, Chauffeurs, Warehousemen and Helpers, Local 71 v. NLRB, 553 F.2d 1368 (D.C. Cir., 1977); Teamsters, Local 344 v. NLRB, 568 F.2d 12 (7th Cir., 1977); Local 851, International Brotherhood of Teamsters v. NLRB, 732 F.2d 43 (2d Cir., 1984); Truck Drivers Local Union No. 807 v. NLRB, 755 F.2d 5 (2d Cir., 1985). These Circuit Courts have held that, based on its legislative history, Sec. 9(b)(3) was designed to minimize the danger of divided loyalty that arises when a guard is called upon to enforce an employer's or customer's rules against fellow non-guard employees who belong to the same union. The Second Circuit recently held that Sec. 9(b)(3) "...encompasses not merely divided loyalties at a company plant, but the potential for divided loyalty whenever a guard is called upon to enforce the rules of his employer against any fellow union member." Id. at 9; see also Burns Electronic Security Services, Inc. v. NLRB, 624 F.2d 403 (2d Cir., 1980).

The proponents of S.1018 suggest that the bill will permit "bailees" and "delivery persons" to be organized by non-guard labor organizations which the proponents assert is currently prohibited by the Board under Section 9(b)(3). This is simply not true. The Board has held that since "bailees" or "delivery persons" are not employed to guard property, enforce rules to protect the property of the employer or customer and/or to protect the safety of other persons, but are merely employed to deliver items from place-to-place, these individuals are not guards within the meaning of Sec. 9(b)(3). Interstate Company, Glass House Restaurants, 125 NLRB 101 (1954); Capitol Transit Co., 105 NLRB 582 (1953); Philadelphia Co. and Associated Cos., 84 NLRB 115 (1949).

The Board has been very sensitive to the purpose and policy of Sec. 9(b)(3). Since the decision of Armored Motor Service, 106 NLRB 1139 (1953), the Board has carefully examined the facts of each case to determine whether the particular employee at issue was confronted with the divided-loyalty dilemma. In Armored Motor Service, the Board rejected the argument that Sec. 9(b)(3) was limited to employees who protect the property of their own employer, which argument could have excluded contract guards as well as armored vehicle guards from the scope of Sec. 9(b)(3). The Board held that the divided loyalty dilemma was nonetheless present, irrespective of whose property the employee was called upon to protect and where and for whom the guard service was to be performed. The Board, in a later case, specifically adopted the legislative intent and statutory construction given Sec. 9(b)(3) by the Third Circuit Court of Appeals in NLRB v. American District Telegraph Company of Pennsylvania, 205 F.2d 86 (3d Cir., 1953), that the concept of what is a guard is not limited to whether the person performing the function is doing so on behalf of his or her own employer at his or her own employer's premises. American District Telegraph Company of The Cleveland Company, 160 NLRB 1130 (1966).

The Board continued its course of examining the facts of each case in light of the purpose and policy of Sec. 9(b)(3) since *Armored Motor Service*. In 1977, the Board, in *Dunbar Armored Express, 211 NLRB 687* (1974), reaffirmed the validity of the application of Sec. 9(b)(3) to armored vehicle guards. It specifically rejected the argument that armored vehicle guards were merely "truck drivers with guns." *Id.* at 689. The Board stated that such an argument was a "facile oversimplification" because, unlike truck drivers or bailees, armored vehicle guards, like plant guards, are "trained, certified and licensed with respect to the possible use of lethal weapons against those who would steal those items." *Id.* Simply stated, the Board was able to distinguish between bailees and guards in light of the policy of Sec. 9(b)(3) concerning the divided-loyalty dilemma.

What is most troublesome concerning S.1018 is that the bill recognizes the validity of the divided-loyalty dilemma as construed by the Board and Federal Courts when applied to "plant guards," but rejects its application to armored vehicle guards. This is true despite the fact that the identical conflict of loyalty dilemma is nonetheless present. In fact, Brink's employs many persons who are non-guards at its facilities who are represented by non-guard unions such as the Teamsters. Thus, not only are the armored vehicle guards confronted with the conflict of loyalty dilemma on the premises of the customers, but they are confronted with the dilemma continuously at Brink's own premises. Our information reveals that our armored vehicle employees spend up to 70 percent of their working time either on our own premises or the premises of the customer, acting as plant guards. Only 30 percent of the time involves protecting the valuables during transit. Thus, they are confronted with the divided-loyalty dilemma at numerous facilities and are, therefore, more likely to be presented with the issue on different occasions than plant guards; this is precisely why the Board and Federal Courts have found such employees to be guards within the purpose and policy of Sec. 9(b)(3).

It is without a doubt that the Board is the body that Congress created to interpret and enforce the National Labor Relations Act. S.1018 reflects disagreement with a decision of the Board, over 32 years old, which held that armored vehicle employees are guards. We believe the question presented by S.1018 is whether the Board should have the power and authority to answer these critical questions of labor law. To say that the Board's power should be curtailed in this regard is to open up the National Labor Relations Act on other issues which have been decided by the Board. We believe the Board should retain and continue to exercise this power, for it is the most knowledgeable body in the field of labor relations.

Brink's has many collective bargaining agreements with non-guard unions, such as the Machinists and Teamsters, who represent non-guard Brink's employees. Our support for Section 9(b)(3) as it currently is construed should not be seen as anti-labor, for we promote collective bargaining. Indeed, we are currently engaged in the NLRB election process at many of our locations with the United Plant Guard Workers of America regarding armored vehicle employees and we currently recognize local guard unions at many of our locations in the United States.

The proponents of S.1018 allege that Sec. 9(b)(3) precludes freedom for guard employees to choose non-guard unions such as the Teamsters in NLRB elections. S.1018 would sacrifice established guard unions in the name of "freedom of choice." Guard employees already have the freedom to exercise fully their right to organize and bargain collectively. We fail to grasp what "freedom of choice" has to do with the distinction between plant guards and armored vehicle guards. In effect, the bill would eliminate the right of guard unions to broaden their membership base through armored vehicle employee membership. To pass S.1018 is to prefer one union over the other in terms of future organizing drives, while ignoring the rationale of Sec. 9(b)(3) which is divided loyalty and the burden it places in interstate commerce, particularly as it relates to the money supply network.

Brink's position is that the issue before you today is the validity of the divided-loyalty dilemma enforced by Sec. 9(b)(3) and, therefore, no distinction should be made as to which types of guards are subject to Sec. 9(b)(3), whether plant guards or armored vehicle guards, because the dilemma exists as to both types of employees. On the other hand, irrespective of the divided-loyalty dilemma, if the issue before you today is whether the Teamsters can represent armored vehicle guards in spite of the purpose and policy of Sec. 9(b)(3), S.1018 would likely accomplish that objective. Brink's strongly urges this Committee to reject S.1018 and, thereby, affirm current law and the Board's decision making power that has correctly and uniformly applied Sec 9(b)(3) to armored vehicle guards.

Senator NICKLES. Thank you very much, Mr. Pagano. We appreciate your comments.

Our next panelist is Mark de Bernardo, manager of labor law for the U.S. Chamber of Commerce.

Mr. DE BERNARDO. Thank you, Senator. I am Mark A. de Bernardo, manager of labor law for the U.S. Chamber of Commerce. I serve as committee executive of the Chamber's Labor Relations Council and I am also a member of the American Bar Association's Committee on Practice and Procedure before the National Labor Relations Board.

The Chamber appreciates this opportunity to appear before the subcommittee and express our views on the issue of independent union affiliation for security guards and its opposition to S. 1018.

While the Chamber recognizes the legitimate right of guard employees to unionize, it also recognizes the need for independence of guard unions. The Chamber, therefore, supports the current law's prohibition against guard unions affiliating with nonguard unions. Such affiliations would create divided loyalty pressures, would compromise the performance of security personnel, especially labor disputes.

I also think it is important to point out at this time, Senator, that S. 1018 not only would affect the armored car, courier, and alarm service industry, but also it would have a major impact on employers throughout the economy. All employers depend, in fact our economy depends on safe, timely, and dependable transport of cash and negotiable instruments between banking institutions and other workplaces via armored car carriers.

Furthermore, employers in a wide range of businesses rely on courier guards for the secure transport of valuables.

For the sake of brevity, I will just read the headings from our statement of the five major reasons for opposition of the Chamber to this legislation.

First, we feel S. 1018 would create divided loyalties among security personnel and thereby compromise their protective and enforcement responsibilities.

Second, S. 1018, contrary to the congressional intent of the Taft-Hartley amendments to the NLRA.

Third, S. 1018 is contrary to the NLRB's and the courts' fair, well-established, and logical guards doctrine.

Fourth, S. 1018 is unnecessary to ensure employee rights to bargain collectively.

And fifth and finally, S. 1018 would subject employers and employees to increased volnerability to organized crime.

This final point I wish to elaborate on because of its importance to the business community, it is of critical concern, particularly in light of the recent report of the President's Commission on Organized Crime.

By permitting nonguard unions to organized armored car guards and other guard employees, S. 1018 would expose America's most vital security industries to control by organized crime. The President's Commission on Organized Crime released a report in January of this year which concluded that the influence of organized crime allows it to dominate * * * international unions and acquire a foothold in the marketplace.

The President's Commission stated that the Teamsters is one of the unions "most frequently associated with organized crime." In recent years, the Teamsters have embarked on an aggressive campaign to affiliate other unions, putting nonTeamster unionized workforces in a broad range of industries.

Section 9(b)(3) currently prevents such expansion into the security guard employees sector, an area in which employee access to sizable amounts of cash and valuables is common.

The Teamsters are the principal union supporting S. 1018 and the union most likely to gain from its enactment. To subject an employer's most valuable assets to the custody of a nonguard union dominated by organized crime increases an employer's vulnerability exponentially.

S. 1018, if passed, would be an invitation to permit organized crime to increase its financial empire and increase its stangelehold on legitimate businesses, would permit organized crime to infiltrate the employee units most likely to benefit from its criminal activities.

Certainly, I should mention that we do not suggest that any one union, that all of its locals, or most of its locals, or most of its members are in fact not law-abiding citizens. I do not think that is the case. But certainly and in our statement we talk about the President's Commission at length, we quote at length, and also we quote at length from the testimony before the Senate Judiciary Committee of Floyd Clarke from the Federal Bureau of Investigation, and we quote at length his conclusions, and I think that they document the case that in fact there is substantial influence of organized crime over some internationals, and some locals and the business community does perceive this to be a threat.

In conclusion, S.1018 does little to expand the rights of guard employees in the American workplace. These employees already have the right to organize and choose bargaining representatives. Enactment of S. 1018 would only make guard jobs more difficult by putting them in a position of having to enforce rules and protect property against their fellow union members when labor trouble strikes.

Undoubtedly, the result would be increased labor strikes and a greater threat to the security of American business.

In addition, the bill's enactment would facilitate organized crime entry and eventual control over the vital security and protective functions on which all Americans ultimately depend. The U.S. Chamber strongly urges this committee to prevent these events by rejecting S. 1018.

I thank you for the opportunity to testify on this important issue.

[The prepared statement of Mr. de Bernardo follows:]

STATEMENT
on
INDEPENDENT UNION AFFILIATION FOR SECURITY GUARDS
and
S. 1018, AN AMENDMENT TO SECTION 9(b)(3) OF THE
NATIONAL LABOR RELATIONS ACT
before the
SUBCOMMITTEE ON LABOR
of the
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Mark A. de Bernardo
April 24, 1986

I. STATEMENT OF INTEREST

I am Mark A. de Bernardo, Manager of Labor Law at the U. S. Chamber of Commerce. I serve as Committee Executive of the Chamber's Labor Relations Council. I also am a member of the American Bar Association's Committee on Practice and Procedure before the National Labor Relations Board.

The Chamber appreciates this opportunity to appear before the Subcommittee on Labor and express its views on the issue of independent union affiliation for security guards and its opposition to S. 1018, an amendment that would redefine "guards" under Section 9(b)(3) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. 159(b)(3).

The Chamber has a strong interest in the NLRA, its enforcement and administration, and any amendments that Congress may consider to this seminal labor relations law. The Chamber strenuously objects to any legislation that would upset the balance in labor-management relations or threaten industrial peace and stability. S. 1018 is such a bill.

II. BACKGROUND OF THE ISSUE

Section 9(b)(3) of the NLRA states that the National Labor Relations Board ("NLRB" or "the Board"), in deciding the unit appropriate for the purposes of collective bargaining, shall not:

> decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership employees other than guards.

Enacted as part of the Taft-Hartley Amendments of 1947, Section 9(b)(3) was designed to minimize the danger of divided loyalty that arises when guards are called upon to enforce their employer's rules against fellow union members.

The "mixed unit" provision of Section 9(b)(3) bars the placement of guards in bargaining units with nonguard employees. The "mixed union" provision bars the NLRB from certifying a union to represent guards if that union admits -- or is affiliated with another union that admits -- nonguard employees to membership. The effect of these restrictions is to insulate guards from other employees in all collective bargaining activities, including strikes, pickets, and boycotts.

In enacting Section 9(b)(3), Congress recognized that if guards belong to the same union as nonguard employees, the guards' loyalty to fellow union members during a strike or other collective action could interfere with the performance of their duties as guards. If, for example, guards at a manufacturing plant belonged to the same union as the manufacturing workers, the guards might be reluctant to protect company property and enforce rules against their striking brethren. In another context, armored car guards who shared union membership with the employees of a bank might choose to recognize the bank employees' picket line rather than perform their duties in transporting cash and negotiable instruments. The threat of such instances of "divided loyalty" prompted Congress to enact Section 9(b)(3).

Under current law, Section 9(b)(3) applies to all types of guard employees. The section covers in-house plant guards and watchmen employed by the company whose premises they guard, as well as contract guards employed by a company that provides security to others on a contractual basis. Also covered are alarm service guards who monitor and respond to electronic burglar, fire, and other types of alarms; armored car guards; and courier guards. Each of these groups is subject to the "mixed unit" and "mixed union" restrictions.

Both S. 1018, introduced by Senator Gorton (R-WA) on April 26, 1985, and its identical House companion bill, H.R. 2489, introduced by Representative Clay (D-MO) on May 14, 1985, would amend Section 9(b)(3):

> by inserting "plant" before "guard" and "guards" wherever "guard" and "guards" appear.

Thus, S. 1016 would limit application of Section 9(b)(3)'s restrictions to plant guards, thereby excluding armored car, courier, and alarm service personnel.

III. SUMMARY OF CHAMBER POSITION

While the Chamber recognizes the legitimate right of guard employees to unionize, it also recognizes the need for independence of guard unions. The Chamber, therefore, supports the current law's prohibition against guard unions affiliating with nonguard unions. Such affiliations would create divided loyalty pressures and would compromise the performance of security personnel, especially during labor disputes.

If enacted, S. 1018 would endanger an employer's assets and personnel during a labor strike and would jeopardize the employer's ability to continue operations. By creating a substantial conflict of interests for armored car, courier, and alarm service personnel -- in direct contravention of the Congressional intent of Section 9(b)(3) of the NLRA and nearly four decades of NLRB and court precedents -- S. 1018 would subject employers to substantially increased, unfair, and unwarranted leverage from a union during a labor dispute. Increased vulnerability to theft, destruction of property, extortion, and other criminal activity also would result.

S. 1018 not only would affect the armored car, courier, and alarm service industries, but also would have a major impact on employers throughout our economy. All employers depend -- in fact, our economy depends -- upon the safe, timely, and dependable transport of cash and negotiable instruments between banking institutions and other workplaces by armored car personnel. Employers in a wide range of businesses rely on courier guards for the secure transport of valuables, such as cash, sensitive or confidential financial or competitive information, checks, bonds, and other negotiable instruments. Small businesses, including small retail establishments, increasingly are finding the use of guard and detective agencies for security purposes necessary.

Clearly, S. 1018 would have a significant impact on a broad spectrum of employers. At a time when both the incidence of labor violence and the influence of organized crime over unions are increasing dramatically, Congress should not be considering legislation that would compromise a company's ability to protect its assets and employees and enhance the opportunity for and "rewards" of criminal activity.

By permitting all security guards not stationed at plants to join general unions, which represent employees other than guards, S. 1018 would exert divided loyalty pressures on armored car, courier, and alarm service personnel. By losing their independence, these guards, thus, would be subjected to disincentives to the performance of their responsibilities. The specific reasons for which they were hired -- protection of company property -- might fall victim to pressures from their union leaders and fellow union members not to enforce company policies, not to protect company assets, not to assure that production and shipments continue, and not to apprehend fellow unionists who are committing crimes.

IV. REASONS FOR THE BUSINESS COMMUNITY'S OPPOSITION TO S. 1018.

Recognizing that S. 1018 would create a major change in direction in our national labor laws, would have a significant impact on a substantial segment of the business community, and would implement bad public policy, the Chamber strongly opposes this legislation:

- S. 1018 would create divided loyalties among security personnel.

  The problem of "divided loyalty" that is unique to guard employees is as real and threatening today as it was in 1947 when Congress enacted Section 9(b)(3). Guards asked to protect property and enforce rules against their fellow union members cannot be expected to perform those duties faithfully in the face of the strong loyalties and obligations that are an inherent part of union membership. The employees that S. 1018 would remove from the coverage of Section 9(b)(3) -- including armored car, courier, and alarm service personnel -- clearly are subject to the dilemma of divided loyalty.

- S. 1018 is contrary to the Congressional intent of the Taft-Hartley Amendments to the NLRA.

  Congress intended Section 9(b)(3) as a broad remedy to the problem of divided loyalty for all types of guard employees. Congress long has recognized that these employees perform special protective and enforcement functions that make the threat of a conflict of interests especially critical and that therefore require the application of Section 9(b)(3).

- S. 1018 is contrary to the NLRB's and the courts' fair, well-established, and logical "guards" doctrine.

Nearly four decades of NLRB and Court decisions have established a logical and consistent policy for applying Section 9(b)(3). This policy has succeeded in preventing divided loyalty conflicts for unionized guard employees. The NLRB accords Section 9(b)(3) guard status on a case-by-case basis, employing an extensive analysis of an employee's duties and training before making its determinations. This long-established, well-defined, and consistent policy for applying Section 9(b)(3) is based on a "totality of the employee's duties" test that focuses on whether the employees in question are subject to the threat of divided loyalties. The Board, before conferring Section 9(b)(3) guard status on couriers and armored car personnel, generally inquires whether those employees: (1) are bonded; (2) need to pass a security clearance; (3) need to receive guard training; (4) wear uniforms; (5) carry firearms; (6) make pick-ups and deliveries before or after the normal workday; (7) have access to customers' locked premises or security vaults; (8) carry locked pouches or containers; and (9) are hired to protect the property of the employer's customers. This process has been refined repeatedly and provides for thorough and logical determinations by the NLRB -- the administrative agency best equipped to address and most knowledgeable of union issues in general and guard issues in particular. Furthermore, the federal circuit courts of appeal provide another safeguard to ensure that the NLRB's determinations of guard status are lawful and appropriate.

- S. 1018 is unnecessary to ensure employee rights to bargain collectively.

Contrary to the claims of some of S. 1018's proponents, Section 9(b)(3) does not deny guard employees the right to unionize and bargain collectively. Section 9(b)(3) merely requires that guards exercise those rights in an environment insulated from other employees. There are numerous guard unions, including the United Plant Guard Workers of America, the International Union of Security Officers, the Independent Watchmen's Association, and the International Guard Union of America. These unions provide a broad choice of representation to those guards who wish to be represented by a union. These unions were organized specifically to represent and accommodate guards, and they recognize, understand, and address the interests of guard employees better than a union dominated by nonguard employees can or would.

- S. 1018 would subject employers and employees to increased vulnerability to organized crime.

By permitting nonguard unions to organize armored car guards and other guard employees, S. 1018 would expose America's most vital security industries to control by organized crime. The President's Commission on Organized Crime released a report on January 14, 1986, which concluded that the "influence" of organized crime allows it "to dominate . . . international unions and acquire a foothold in the marketplace." The President's Commission stated that the International Brotherhood of Teamsters is one of the unions "most frequently associated with organized crime." In recent years, the Teamsters have embarked on an aggressive campaign to "raid" other unions, affiliating non-Teamster unionized work forces in a broad range of industries. Section 9(b)(3) of the NLRA currently prevents such expansion into the security guard employee sector, an area in which employee access to sizeable amounts of cash and valuables is common. The Teamsters are the principal union supporting S. 1018 and the union most likely to gain from its enactment. To subject an employer's most valuable assets to the custody of a nonguard union dominated by organized crime increases an employer's vulnerability exponentially. S. 1018 is an invitation to organized crime, through unions it controls,

> to increase its financial empire and its stranglehold on legitimate businesses. It would permit organized crime to infiltrate the employee units most likely to benefit its criminal activities.

V. CONTROL OF ORGANIZED LABOR BY ORGANIZED CRIME IS INCREASING AND WOULD BE ENHANCED BY PASSAGE OF S. 1018.

S. 1018, if enacted, would benefit substantially organized crime in America.

The President's Commission on Organized Crime reported on January 14, 1986, to the President and the Attorney General, after a two-and-one-half year investigation, that the major unions "most frequently associated with organized crime" are the International Brotherhood of Teamsters, the Laborers' International Union, the International Longshoreman's Association, and the Hotel Employees and Restaurant Employees International Union.

The President's Commission stated:

> Organized crime in America is entrenched in the marketplace. It owns and operates legitimate businesses, and in some areas of the country, it controls segments of entire industries. Throughout the economy, organized crime distorts the cost of doing business through theft, extortion, bribery, price fixing, and restraint of trade. The Commission has found that in many instances the key to this marketplace corruption is the control and exploitation of labor unions by

> *organized criminals*. . . . Millions of dollars of workers' dues and benefits monies have been siphoned off by organized crime through outright *embezzlement* or more sophisticated devices, such as loans or excessive fees paid to corrupt unions and trust fund service providers. . . . Through various examples the report describes *the web of corruption that has pervaded segments of markets held captive by organized crime*. Summary of Recommendations, President's Commission on Organized Crime, *Daily Labor Report*, January 15, 1986, p. D-2 (emphasis added).

The security guard and protective transport services industries would become, if S. 1018 were enacted, a fertile ground for what the President's Commission called organized crime's/organized labor's "web of corruption," "control and exploitation," and "theft, extortion, bribery . . . [and] embezzlement."

The Teamsters, one of the international unions that the President's Commission found to be "most frequently associated with organized crime", has attempted for decades to organize armored car and courier personnel, as NLRB case law demonstrates. The Teamsters' union dominance in trucking and other transportation industries would give that union an existing occupational nexus to armored car and courier drivers and guards. Furthermore, the Teamsters is the most active supporter of S. 1018 and have made clear its intentions of "affiliating" the now independent guard unions.

The threat that "control" of unions by organized crime poses was reinforced in the testimony of Floyd I. Clarke, Deputy Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation ("the FBI") before the Senate Committee on the Judiciary, on April 30, 1984. Clarke, like the President's Commission, identified the Teamsters as one of four international unions "substantially influenced and/or controlled by organized crime." Clarke testified that:

> Infiltration and manipulation of labor unions has been one of the many corrupt practices of traditional organized crime in this country and experience has shown that the control of the labor unions, corrupt public officials, and *control of legitimate businesses provides the traditional organized crime groups with* extreme power in the industrial world, as well as *large amounts of money* with which they carry on a myriad of other illegal activities. However, organized crime figures *continue to use force and violence which includes gangland type slayings* to attain their criminal goals ... *organized crime figures routinely extort employers or companies whose employees are represented by these unions*. . . The increased demands for the employer to pay money to the union or to its associated funds *provides the organized crime figure with an increased power or financial base*" (emphasis added).

Clearly, allowing employers' most valuable assets to be within the grasp of organized crime is an invitation to financial disaster. Domination of security and protective services unions would present organized crime with the most lucrative access to an employer's assets, an access no other type of collective bargaining unit could provide.

If S. 1018 is passed, organized crime will be given an open invitation to take control (through such unions as the Teamsters) of the very employees whose duty it is to protect property and enforce rules against criminals and other dangerous elements. Those employees -- guards -- are vital to American employers and to America's economic welfare. Not just "plant guards," but all types of guard employees, must be reliable, loyal employees to whom employers can entrust their valuable property and the welfare of their businesses. Even the smallest of employers depends upon courier guards for the safe transport of valuable items. And the lifeblood of our economy -- the banking system -- cannot survive without reliable armored car guards to transport billions of dollars in cash, bearer bonds, and other valuable commercial instruments. In short, all employers depend too heavily upon having reliable guard and security personnel to take the risk of organized crime controlling those personnel.

The Crime Commission's report describes how union racketeering is the key to organized crime's control of business. A frightening illustration of what can happen is the story of Dan Cunningham, who literally bought a guards' union operating in New York and eventually throughout the east. Cunningham, now serving prison time for embezzlement, racketeering, bribery, and other federal convictions, established and used several ostensibly legitimate guards' unions to gain inroads into the guard and security industries. In addition to embezzling union dues and pension funds and, thereby, robbing guard employees of money rightfully theirs, Cunningham established an extensive organized crime network connected with the leading crime families in New York. See Cook, "Brother Cunningham and the Guards," Forbes,

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February 14, 1983, pp. 107-14. S. 1018 only will make the occurrence of such events easier. This Committee must ask itself whether it is appropriate to give a union that the President's Commission on Organized Crime and the FBI already have found to be associated with organized crime the power to control the individuals responsible for guarding and transporting the nation's valuables.

The Chamber urges this Committee to consider carefully the recommendations made by the Organized Crime Commission. Section 11, Part II of the Commission's report offers a number of specific legislative changes that would help to break organized crime's hold on organized labor. Among the recommended changes are a proposal to make it an unfair labor practice for a labor organization to be dominated by organized crime or for any employer to encourage or assist organized crime in dominating a labor organization. Under current law, it is an unfair labor practice for an employer to refuse to bargain with a union on the grounds that it is dominated by organized crime. Adoption of the Crime Commission's proposal would reverse this absurd rule and allow employers to join in the fight against organized crime by refusing to deal with organized crime-dominated unions.

Another recommendation made by the Crime Commission is the passage of a labor bribery statute that would make the purchase of a union or union office or the selling of the right to obtain union work unlawful. Existing law makes it unlawful for an employer to bribe a union officer, but criminal prosecutions for bribery that does not involve an employer can be undertaken only in peripheral ways, such as through the wire fraud statute. The enactment of a labor bribery statute would deter unions and employers alike from succumbing to bribery by organized crime that is aimed at criminal control of labor and business.

Other recommendations in the report of the President's Commission include making it a felony to use violence to deprive union members of their rights, giving the Secretary of Labor authority to act on behalf of union members when union officers breach their fiduciary duties and become involved in organized crime, tightening the reporting and disclosure requirements that are imposed on unions, and developing stricter supervision of multi-employer pension and employee benefit funds. There are many legislative responses available to the Committee which would address appropriately the problem of organized crime's control of unions.

VI. S. 1018 WOULD SUBJECT MORE EMPLOYERS TO LABOR VIOLENCE.

As reported by the President's Commission on Organized Crime and the Federal Bureau of Investigation, the criminal activity of organized crime/organized labor has escalated to severe dimensions. These criminals perpetrate embezzlement, extortion, theft, assault, and even murder to achieve their criminal objectives. The likelihood of criminal activity is increased if such criminals are given direct access to a company's most valuable assets: currency, checks, legal documents, competitive information, pharmaceuticals, formulas, explorative or geological readings, and bidding data. Increasing what an organized crime-dominated union has to gain by criminal activity might result in a corresponding increase in the level and severity of criminal activity.

Labor violence is already a major problem in the United States. While most unions do not engage in labor violence and most union members are law-abiding, some unions engage in a systematic strategy of labor violence and extortion, particularly those unions controlled by organized crime.

Labor violence annually is growing in frequency and severity in our country. In the past ten years, 5,100 recorded incidents of labor violence have occurred during labor disputes, including 2,300 physical assaults and 66 murders. While strike activity is decreasing, labor violence is increasing. In fact, a 1983 study of labor violence published by the Wharton School of Business at the University of Pennsylvania found that "violence in labor disputes is a pervasive, widespread and continuing problem." More importantly, the Wharton study concluded that for some unions, labor violence has become a standard tactic in their collective bargaining.

Especially in light of the current trend of increased labor violence in our country, the Chamber urges this Committee to reject legislation that would:

- Increase the incentive for unions "associated" with organized crime, such as the Teamsters, to engage in criminal activity by increasing the access of such unions to valuables and the leverage of such unions over employers and employees?

- Compromise the protective and enforcement resources of employers by subjecting security personnel to divided loyalty dilemmas?

- Increase the likelihood of crime by criminals not affiliated with unions by increasing the incidence when armored car, courier, and alarm service personnel will honor picket lines, thereby leaving company assets in the hands of individuals unequipped and untrained to transport or protect these assets?

VII. S. 1018 WOULD SUBJECT EMPLOYEES TO INCREASED INCIDENCE OF CRIME.

To the extent that S. 1018 would increse the opportunity and incentive for crime, it also would increase the number of victims of crime. Surely the employer, the consumer, and the union members themselves lose as a result of criminal activity. Management and nonunion employees also would be more likely to be victims if S. 1018 became law.

Directly, they would be victimized by a lack of proper security and the increased incidence rate of violence. With no professional armored car or courier personnel to perform the duties, managers or other employees may be called upon to deliver payrolls, bank deposits, or security instruments. The customer of the security services -- now without the assistance of guards due to their failure to cross their fellow union members' picket line -- would have no choice but to perform guard services themselves and, in so doing, would expose the lives and safety of its employees and the public to increased danger. The option is to allow receipts -- in a supermarket, department store, or bank, for example -- to accumulate while picket lines are observed, labor violence increases, security resources are depleted, and the cash on hand and the risk of its loss increase. This is no option.

Indirectly, employees also are at risk. The increased likelihood that an employer's property will not be protected, assets will be stolen, and operations will be disrupted or discontinued could translate into a loss in customers and suppliers and, thereby, threaten the financial stability of the employer and jeopardize the jobs of the employees.

VIII. THE CHAMBER ALSO SUPPORTS PRESERVATION OF SECTION 9(b)(3) FOR PLANT GUARDS

While the Chamber strongly opposes S. 1018 and its withdrawal of application of Section 9(b)(3) to armored car, courier, and alarm service personnel, it also strongly opposes any efforts to repeal Section 9(b)(3) altogether.

The Chamber appreciates that Senator Gorton (R-WA), Representative Clay (D-MO), and the cosponsors of S. 1018 and H.R. 2489 acknowledge the divided loyalty problem of "mixed units" and "mixed unions" and implicitly support Section 9(b)(3)'s application to plant guards. At the same time, however, the Chamber is aware that some union representatives and some proponents of these bills would like to expand revocation of the requirement that guard unions be independent. Their goal is revocation of Section 9(b)(3)'s application to all guards -- on-site and off. For the same reasons that the Chamber opposes S. 1018, it opposes any amendment to expand S. 1018.

Divided loyalty compromises the performance of critical security responsibilities, responsibilities that employers -- and our economy in general -- can ill afford to compromise, regardless of whether such divided loyalty affects armored car and courier personnel or plant guards.

IX. THE EFFECT OF S. 1018

S. 1018 would ignore the divided loyalty problem that prompted the enactment of the guard amendment and would treat all but a small group of guards the same as other employees. Only "plant guards" would be subject to Section 9(b)(3)'s restrictions, if the bill passed. Thus, armored car, courier, and alarm service personnel all would be placed in bargaining units with nonguard employees. They also would be represented by unions that have nonguard members or are affiliated with other unions that have such members. S. 1018 would exacerbate the very threat that Section 9(b)(3) is aimed at avoiding.

That problem -- the threat that vital protective and security needs will go unmet if guards are placed in the predicament of carrying out their duties against fellow union members -- is as real today as it was in 1947 when Section 9(b)(3) was enacted. The diverse employers whom the Chamber represents face that threat each day. They know the disasters that can result if guards -- on whom all employers rely -- fail to carry out their protective duties because of loyalties to their nonguard union brethren.

X. THE PURPOSE OF SECTION 9(b)(3)

To realize the impact that S. 1018 would have, it is necessary first to understand why Congress enacted Section 9(b)(3). The section was incorporated into the NLRA with passage of the Taft-Hartley Amendments in 1947. Prompted by an awareness of the divided loyalty problem that had faced employers for many years and by the failure of the Supreme Court and the NLRB to address that problem adequately, Congress carefully designed the remedy contained in Section 9(b)(3).

Before the guard amendment was enacted, the NLRB had attempted unsuccessfully to deal with the unique circumstances surrounding guard employees. The Board routinely placed guards and watchmen in a bargaining unit separate from other employees, although the same union was permitted to represent both groups. See, e.g., Foote Bros. Gear and Machine Corp., 52 N.L.R.B. 861 (1943); Lord Mfg. Co., 47 N.L.R.B. 1032 (1943); Julius Petersen, 46 N.L.R.B. 1049 (1943). This practice of restricting "mixed units" now is codified in Section 9(b)(3). The problem of divided loyalty persisted, however, because guards who belonged to the same union as nonguard employees were being forced to choose between fealty to their union or protection of their employers' interests during labor disputes. Thus, although the NLRB recognized that guards' unique responsibilities differentiate them from other employees and make their allegiance a necessity for employers, the agency's policies did not succeed in assuring that allegiance.

During consideration of the Taft-Hartley Amendments in 1947, the inadequacies of NLRB policy became clear to Congress. Prompted by a Supreme Court decision that fully embraced that policy, the legislators enacted Section 9(b)(3). The new provision ensured that guards would perform their duties faithfully in the face of union unrest and it guaranteed them the right to organize and bargain collectively through their own unions.

The Supreme Court decision that spurred Congress to act was NLRB v. Jones & Laughlin Steel Corporation, 331 U.S. 416 (1947), which upheld a Board order requiring an employer to recognize the union that represented its production workers as the bargaining representative for a unit of plant guards. The Court deferred to the NLRB's broad discretion in determining bargaining units and agreed with the Board that the right of guards to choose a bargaining agent could be ensured "provided only that they be placed in separate bargaining units." Id. at 420-21. This ruling reversed two decisions by the Sixth Circuit that had cited the threat of divided loyalty as grounds for refusing to allow the union to represent the guards.

Ultimately, it was the Sixth Circuit's reasoning that convinced Congress to enact Section 9(b)(3). The circuit court had recognized that by belonging to the same union as nonguard employees, guards might be placed in a position of "conflict with other members of their union over the enforcement of some rule or regulation they were hired to enforce." NLRB v. Jones & Laughlin Steel Corp., 146 F.2d 718, 722 (6th Cir. 1945). On remand from the Supreme Court for reconsideration of its decision, the circuit court had re-emphasized that:

> In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards . . . would be incompatible with their obligations to the union which, since it represents production employees, authorizes and directs the strike. NLRB v. Jones & Laughlin Steel Corp., 154 F.2d 932, 935 (6th Cir. 1946).

The judges of the Sixth Circuit were convinced that merely placing guards in separate bargaining units was an insufficient solution to the divided loyalty problem and that a union admitting nonguard members should not be permitted to represent guards.

Guided by the circuit court's clear statement of the special problems surrounding guard employees, Congress incorporated Section 9(b)(3) into the Taft-Hartley Amendments. The new section codified the NLRB's existing practice of placing guards in separate bargaining units. More importantly, Section 9(b)(3) barred Board certification of "mixed unions" as the bargaining representative for guards and, thereby, insulated guards from any possible conflict of loyalties.

The legislators clearly indicated that the divided loyalty problem was their primary focus. Senator Taft, one of the primary sponsors of the Taft-Hartley Amendments, stressed this point:

> The conferees on both sides . . . have been impressed with the reasoning of the Circuit Court of Appeals for the Sixth Circuit in the *Jones and Laughlin* case in which an order of the Board certifying as a bargaining representative of guards, the same union representing the production employees was set aside. 93 Cong. Rec. 6601 (1947), *reprinted in* 1 N.L.R.B., *Legislative History of the Labor Management Relations Act, 1947*, at 1541 (1974).

Clearly, a complete resolution of the divided loyalty problem could be achieved only by barring NLRB certification of mixed unions seeking to represent guards. In Senator Taft's words, "as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees." *Id*. at 6603 (1947), reprinted in *Legislative History*, *supra*, at 1544.

Congress also made it clear that Section 9(b)(3) should be broadly applied to all types of guard employees so that the divided loyalty problem would be avoided wherever it might arise. The conference report on the Taft-Hartley Amendments emphasized that no bargaining unit would be appropriate under Section 9(b)(3) if it combined "other employees" with persons employed "as a guard to enforce against employees *and other persons* rules to protect property belonging to the employer *or for which the employer is responsible*, or to protect the safety of *persons* on the employer's premises." Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess. 47 (1947), reprinted in

Legislative History, supra, at 551 (emphasis added). Thus, Congress intended Section 9(b)(3) to encompass guards who enforce rules and protect property against "other persons," not just "other employees," and who protect the safety of "persons" on the employer's premises, not just "employees." In addition, the section was to cover not only guards who protect their employer's property but also those who protect property "for which the employer is responsible." Clearly, the legislators who enacted Section 9(b)(3) wanted it to extend to a broad range of guard employees, not just "plant guards" like those in the Jones & Laughlin case.

The origins of Section 9(b)(3) reveal two fundamental principles that are as relevant to the workplace today as they were forty years ago when the provision was enacted: (1) the allegiance of guard employees to their employers is critical, and that allegiance will be weakened if guards are faced with the demands of membership in a nonguard union; (2) divided loyalty is an imposing threat for all types of guard employees and Section 9(b)(3) must be applied broadly to ensure that the threat is avoided wherever it might arise. If S. 1018 is enacted, these principles will be ignored and employers will again be plagued by the pervasive problems that they faced prior to 1947.

XI. INTERPRETATION OF SECTION 9(b)(3) SINCE ITS ENACTMENT

With the enactment of Section 9(b)(3), Congress sought to prevent the problem of divided loyalty from hindering guards in the performance of their duties. The provision was intended as a broad solution that would guarantee employers reliable guard employees to protect property and enforce rules. It was left to the NLRB and the courts, however, to apply Section 9(b)(3) in particular circumstances and to determine with more specificity which guard employees are subject to the threat of divided

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loyalty and, therefore, should be covered by the section. As the use of guards and security employees has increased, that task has not always been an easy one. Nevertheless, a long and consistent line of NLRB and court decisions has developed a workable and reliable framework for applying Section 9(b)(3).

The Jones & Laughlin decision that was the focus of Congressional attention during the passage of the guard amendment concerned plant guards and watchmen. Thus, the NLRB concluded early on that these employees are covered by Section 9(b)(3). Hilary Young, D/B/A Young Patrol Service, 75 N.L.R.B. 404 (1947). There were numerous references in the legislative history to "plant guards," and it is clear that employees engaged in on-site property protection and rule enforcement are within the section's coverage. Even where the on-site guards are actually employed by a contract guard service, the NLRB long has applied Section 9(b)(3). Allen B. Dumont Laboratories, Inc., 88 N.L.R.B. 1383 (1953). Likewise, the Board consistently has applied the section to guards who spend a majority of their work time performing nonguard duties.

For on-site plant guards and watchmen, the NLRB needed merely to ask whether the employees in question had the duty to protect property and enforce rules. However, whether other types of guards should be covered by Section 9(b)(3) proved to be a more difficult question. After some initial confusion, the NLRB and the courts soon discovered that the underlying rationale of the guard amendment -- the goal of remedying the divided loyalty problem -- was the key to answering that question.

The first non-plant guard case in which the NLRB applied Section 9(b)(3) was Brink's, Inc., 77 N.L.R.B. 1182 (1948), which concerned the status of armored car guards. A decision that eventually was reversed, Brink's read the legislative history of

Section 9(b)(3) very narrowly to conclude that the section was applicable only to "plant guards." As the Board later would recognize, the fundamental error in Brink's was its failure to focus on the problem of divided loyalty. Armored car guards, like on-site plant guards, are subject to divided loyalties whenever they encounter fellow union members or members of an affiliated union engaged in a picket line or other collective activity. The Brink's decision's failure to recognize this resulted in its eventual reversal.

After Brink's, a series of Board decisions focused on alarm service guards and contract guards employed by American District Telegraph Company (ADT). ADT provided monitored, electronic alarms and other protective services to its customers, and its guards worked on the customers' premises as part of those services. The NLRB vacillated on whether the ADT guards should be covered by Section 9(b)(3). Still searching for a logical method for determining which employees are guards, the Board emphasized that the ADT guards protected property that belonged not to their employer (ADT), but to ADT's customers. In a 1950 decision, the Board adopted the position that Section 9(b)(3) "was directed at persons employed to enforce rules to protect the property of their own employer, or to protect on the premises of their own employer the safety of persons, and not as guards of the sort" employed by ADT. American District Telegraph Co., 89 N.L.R.B. 1228, 1231 (1950). By again failing to focus on the divided loyalty rationale, the Board laid the groundwork for a subsequent reversal of its decision.

The turning point for the treatment of non-plant guards, such as those working for armored car companies and ADT, came in 1953 in a decision by the Court of Appeals for the Third Circuit in NLRB v. American District Telegraph Company of Pennsylvania, 205 F.2d 86 (3d Cir. 1953). That decision squarely focused on the divided loyalty rationale of the guard amendment and showed how the amendment should be applied to prevent the problems that concerned Congress in 1947. The court first examined the statutory language of Section 9(b)(3) to conclude that it is not limited to one who protects property or enforces rules for his or her own employer. _Id_. at 89. More importantly, the court emphasized that the primary impetus behind Section 9(b)(3)'s passage was the Sixth Circuit's discussion in _Jones & Laughlin_ of the divided loyalty problem. The court then illustrated how that discussion is relevant to guards like the ADT employees:

> In the event of an alarm from a strike-bound subscribing plant (ADT's) guards might be forced to cross a picket line of their fellow unionists in order to fulfill the primary obligation of both their employer and of themselves as guard employees. . . . If the Board could visualize such [a] situation it does seem that it would then be forced to concede that 9(b)(3) would effectively prevent its occurrence. Testimony in this record shows it could happen. The union representative indicated that if the particular union directed (ADT's) guards to observe the picket line it would expect compliance with that order. _The constitution of the union in evidence, and under which members are required to obey all lawful orders of the Executive Board, corroborates this view._ _Id_. at 90 (emphasis added).

This clear exposition of the rationale behind Section 9(b)(3) and how it applies to guards in a variety of contexts provided the NLRB with an analytical framework upon which a consistent, well-reasoned body of "guard law" could be developed.

The NLRB quickly recognized the logic and power of the Third Circuit's reasoning. In *Armored Motor Service Company, Inc.*, 106 N.L.R.B. 1139 (1953), the Board reversed its earlier *Brink's* ruling and extended Section 9(b)(3) to armored car guards. Emphasizing that it is immaterial whether guards protect property and enforce rules for their own employer or for a customer of their employer, the Board went on to recognize the import of the divided loyalty rationale in interpreting and applying the guard amendment:

> The danger of divided loyalty which Congress sought to eliminate may not be quite so far-reaching in the case of armored-car guards, but it is, nevertheless, present. *A conflict of loyalty could arise, for example, if the guards should be called upon to deliver money or valuables to one of their customers whose employees were represented by the same union as represented the armored-car guards and the employees of the customer were on strike and picketing the premises of the customer*. *Id*. at 1140 (emphasis added).

Thus, the NLRB recognized that armored car guards, as well as alarm service and contract guards, such as those provided by ADT, are within the intended ambit of Section 9(b)(3).

The Board steadfastly has held to that position since 1953. Whether dominated by Democratic or Republican, "pro-labor" or "pro-management" members, the Board has relied upon the divided loyalty rationale with unwavering consistency for over 30 years.

See, e.g., American District Telegraph Co. of the Cleveland Co., 160 N.L.R.B. 1130 (1966). In a 1974 case, for example, the Teamsters, who were seeking to organize a group of armored car guards, charged that the armored car company's service was "no different than that of a regular trucking operation," and that the guards were merely "truckdrivers with guns." Dunbar Armored Express, 211 N.L.R.B. 687 (1974). The Board termed these charges a "facile oversimplification" and reiterated that employees with a particular duty to protect the property they transport have unique responsibilities that make the threat of divided loyalty especially grave. Id. at 689.

The federal courts uniformly have agreed with the NLRB's rulings on the status of armored car guards. See, e.g., Drivers, Chauffeurs, Warehousemen and Helpers, Local No. 71 v. NLRB, 553 F.2d 1368 (D.C. Cir. 1977); International Brotherhood of Teamsters, Local 344 v. NLRB, 568 F.2d 12 (7th Cir. 1977); Truck Drivers Local Union No. 807 v. NLRB, 755 F.2d 5 (2d Cir. 1985); Fuchs Ex Rel. NLRB v. Teamsters Local Union No. 671, 398 F. Supp. 243 (D. Conn. 1975); Humphrey v. Drivers, Chauffeurs & Helpers Local 639, 369 F. Supp. 730 (D. Md. 1974). The United States Court of Appeals for the D.C. Circuit recognized that Section 9(b)(3) was "designed to minimize the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer against a fellow union member" and that it is "clearly within the realm of reason" for the Board to conclude that the danger may arise if a nonguard union is certified to represent armored car or other types of guards. Local 71, supra, 553 F.2d 1368. 1373-74. The universal judicial acceptance of the Board's Section 9(b)(3) policies highlights the apropriateness and logic of these policies. Indeed, few other areas of NLRB decisionmaking have been characterized by such consistency and unanimity, particularly over such a lengthy period as 33 years.

The most recent group of employees to be included in Section 9(b)(3)'s coverage is courier guards. With the explosive growth of the courier industry and an ever-increasing number of employees engaged in the secured transport of valuable property, the Board has been presented in recent years with numerous cases questioning the status of courier guards. Courier companies engage in the bonded transport of valuable items (inter-company documents, bank deposits, and bearer bonds, for example), and their employees are subjected to security clearances. In addition, the employees are responsible for protecting the items they transport. Thus, it is understandable that courier companies, as well as users of the courier services, are concerned about the threat of divided loyalties interfering with the couriers' performance of their duties.

Recognizing that threat, the NLRB and the federal courts consistently have determined that couriers are within the coverage of Section 9(b)(3). In a 1976 decision, Brink's, Inc., 226 N.L.R.B. 1182 (1976), the Board emphasized that the dispositive issue in determining whether couriers are guards within the meaning of Section 9(b)(3) "is whether the couriers here protect property of the employer's customers." Id. at 1183. The Board determined that couriers are entrusted with customers' "valuable property," are responsible for its "safe and timely delivery," and sometimes are required to secure the premises of banks and other establishments that they enter after business hours. These duties, the Board concluded, make the threat of divided loyalty especially critical and, thus, require that couriers be covered by the guard amendment. The Board has reiterated in more recent cases that couriers who are employed to protect customers' valuable property are covered by Section 9(b)(3). See, e.g., MDS Courier Service, Inc., 248 N.L.R.B. 1320 (1980); Purolator Courier Corp., 266 N.L.R.B. 384 (1983).

As with the decisions concerning alarm service and armored car guards, the federal courts have agreed with the NLRB's assessment of courier guards. In Local 851, International Brotherhood of Teamsters v. NLRB, 732 F.2d 43 (2d Cir. 1984), the Second Circuit rejected the Teamsters' argument that Purolator couriers were merely truckdrivers who should not be considered guards. The court emphasized that the couriers were responsible for protecting valuable property and for securing the premises of Purolator customers in some circumstances. Id. at 44. In addition, the court noted that over 30 years of Board decisions had interpreted Section 9(b)(3) "to encompass more than 'plant guards'" and that both the legislative history and the statutory language supported that interpretation. Id.

As the NLRB and court decisions interpreting Section 9(b)(3) make clear, a reliable analytical framework has been developed for determining when the section should be applied to particular guard employees. That analysis focuses on the duties of guards to see if the threat of divided loyalty is present. Using the analysis, the NLRB and the courts have remedied that threat to ensure reliable guard employees to protect property and enforce rules on behalf of employers. In short, more than 30 years of consistent policy make clear that Section 9(b)(3) has operated effectively as a broad solution to resolve the problem of divided loyalty.

Passage of S. 1018 would destroy the effective policies that the NLRB and the courts have built. Employers no longer would be assured the allegiance of the employees to whom they entrust the safety and security of their businesses.

XII. CONGRESS'S RESPONSE TO DATE

The wide acceptance and success of existing policies regulating guard employees can be measured by their repeated endorsement by Congress. Although Congress has passed several major labor law revisions during the past three decades and has been presented with numerous proposals to amend Section 9(b)(3), existing policies have been reaffirmed. Clearly, Congress has recognized the necessity of insulating guard employees from other workers to insure that they carry out their duties without the distractions and pressures of membership in a nonguard union.

Efforts to lift the "mixed union" restriction repeatedly have failed. The first such attempt came in 1959 with consideration and eventual passage of the Landrum-Griffin Act. Senator Humphrey (D-MN) proposed an amendment lifting the restriction, ostensibly to permit guard unions to affiliate with nonguard unions. 105 Cong. Rec. S. 4918-19 (daily ed. April 8, 1959) (statement of Sen. Humphrey), reprinted in 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1015 (1959). The amendment received no other support, however, and died in committee. Legislation introduced in 1975 by Senator Mondale (D-MN) and Representative Thompson (D-NJ) (S. 2227, 94th Cong., 1st Sess. (1975); H.R. 3904, 94th Cong., 1st Sess. (1975).) to lift the restriction also was rejected. The Congressional sentiment has remained strongly in favor of insulating unions that represent guards from nonguard unions.

The most significant attempt to amend Section 9(b)(3) was made during consideration of the Labor Reform Act of 1977 when the House passed, as part of other wide-ranging labor "reforms," provisions that would have narrowed the scope of the "mixed union" restriction. The new provisions would have barred NLRB certification of a nonguard union to represent guards only if that union represented "nonguard employees of the same employer at the same location" or if it were directly affiliated with any labor organization representing the employer's nonguard employees at the same location. (H.R. 8410, 95th Cong., 1st Sess. Sec. 4 (1977).) The effect of these changes would have been to make the "mixed union" restriction applicable only to in-house plant guards directly employed by the same company whose property they protect and rules they enforce. Armored car, courier, and alarm service personnel all could have joined unions that represent nonguard employees on the premises where the guards work. The underlying premise of these proposed changes was that only in-house guards are subject to the threat of divided loyalty. Since other types of guards often operate as the functional equivalent of in-house guards, that premise clearly was flawed.

Recognizing the shortcomings of the House-approved changes, Senator Riegle (D-MI) offered an amendment in the Senate that would have retained the mixed union restriction for "guards regularly assigned to work on the premises of two or more employers" (i.e., contract, alarm service, armored car, and courier guards). (S. 2467, 95th Cong., 2d Sess. Sec. 5 (1978).) This Committee, then called the Committee on Labor and Public Welfare, endorsed the Riegle Amendment and included it in the final version of the Labor Reform Act that was sent to the Senate floor. (S. Rep. No. 628, 95th Cong., 2d Sess. 36 (1978).) However, the Senate defeated on a procedural vote the 1977 labor "reform" measures and none of the proposed changes were enacted. In the end, Congress once again had reaffirmed the broad application of Section 9(b)(3) to remedy the threat of divided loyalty.

Efforts by Representative Clay in 1983 to amend the guard provision (H.R. 2197, 98th Cong., 1st Sess. (1983); H.R. 2198, 98th Cong., 1st Sess. (1983)) met the same fate as prior attempts. Recognizing the importance to American employers of having reliable guard and security employees, Congress repeatedly has endorsed the broad application of Section 9(b)(3). Congress and this Committee in particular have recognized that Section 9(b)(3) is a necessary and appropriate labor-management relations provision that has been administered well by the NLRB and the courts.

XIII. S. 1018 IS AN ATTEMPT TO CHANGE A LAW THAT DOES NOT WARRANT CHANGING

As the preceding discussion clearly indicates, S. 1018 is by no means the first attempt to amend the guard provision. In view of nearly four decades of Board and court decisions establishing a consistent, sound line of policy, it is surprising that these efforts continue. The repeated refusal of this Committee and the entire Congress to disturb existing law says much about the worth and effectiveness of Section 9(b)(3) as it currently is interpreted and applied. That refusal also suggests that there are sound reasons for rejecting S. 1018.

The legislative history of the guard amendment, as well as decisions interpreting and applying it, well illustrates the threat that divided loyalty poses and the need to deal with that threat. However, S. 1018's proponents sometimes have diverted attention from the problem of divided loyalty that is at the foundation of Section 9(b)(3).

In introducing S. 1018 on the Senate floor last year, Senator Gorton, the bill's primary sponsor, argued that because of Section 9(b)(3) employees in the armored car and courier industries "have been left without the legal right to the a bargaining representative of their choice." 131 Cong. Rec. S4888 (daily ed April 26, 1985) (statement of Sen. Gorton). However, Section 9(b)(3) does *not* deny guards in these or any other industry the right to choose a bargaining representative. While the chosen representative may not represent nonguard employees and may not be affiliated with a union that represents such employees, guards are still free to choose representation by a variety of guard unions. In addition, guards are free to organize their own union.

Senator Gorton also has contended that armored car and courier guards "are not 'guards,' within the meaning of Section 9(b)(3); rather they are 'bailees,' temporarily safeguarding the property of the employer's customers while it is being transported." *Id*. This assertion ignores the important services that guards in the armored car and courier industries perform. Subscribers to armored delivery services or bonded courier services engage those services precisely because of the special protective safeguards that they offer. As the NLRB stressed in the 1974 *Dunbar Armored Express* decision, an armored car company is "engaged in the transportation of *valuable* items owned by others and, in order *to insure the safe transportation of these items*, its employees are trained, certified, and licensed with respect to the possible use of lethal weapons against those who would steal those items." 211 N.L.R.B. at 690 (emphasis added). Similarly, courier guards are specially trained, bonded, and subjected to careful security clearances to ensure the safety of the goods that they transport. These employees have the virtually exclusive duty to protect the property entrusted to them. Clearly, they are more than "bailees."

Contrary to the position of some proponents of S. 1018, the divided loyalty rationale behind Section 9(b)(3) does not apply only to plant guards. It is a public necessity to insulate guards -- all employees who perform protective and enforcement functions -- from nonguard employees. That fact cannot be denied or avoided by mischaracterizing these guards merely as "bailees" or misstating that they do not enjoy rights to choose a bargaining representative. The careful balance drawn by Section 9(b)(3) guarantees employers reliable guard employees, while preserving the rights and freedoms of those employees. There can be little doubt, in view of the long-established policy supporting Section 9(b)(3), of the continuing validity and necessity for this provision.

XIV. CONCLUSION

S. 1018 does little to expand the rights of guard employees in the American workplace. Those employees already have the right to organize and choose bargaining representatives. The enactment of S. 1018 would only make guards' jobs more difficult by putting them in the position of having to enforce rules and protect property against their fellow union members when labor trouble strikes. Undoubtedly, the result would be increased labor strife and a greater threat to the security of American business. In addition, the bill's enactment could facilitate organized crime's entry and eventual control of the vital security and protective functions on which all Americans ultimately depend. The U.S. Chamber strongly urges this Committee to prevent these events by rejecting S. 1018.

Thank you for this opportunity to testify on this important issue.

Senator **Nickles**. Thank you very much.

Our next panelist is Melvin Bailet, senior vice president of Mayne Nickless, from Seattle, WA, representing the National Armored Car Association.

Mr. **Bailet**. Thank you very much, Senator.

Mr. Chairman, my name is Melvin Bailet. I reside in Seattle, WA. I am a senior vice president and general counsel of Mayne Nickless, Inc., the parent company and owner of Loomis Armored, Inc., and am appearing here today on behalf of the company and the National Armored Car Association, of which my company is a member and of which I am president-elect.

I have been engaged in the armored car business for 22 years in various capacities at senior management levels. The National Armored Car Association is composed of armored car companies whose operations extend throughout the United States and represent a large percentage of the armored car service volume in this country.

Our industry provides a unique and vital service to the commercial life of our Nation. It is our responsibility to provide the protective and custodial transportation functions which are necessary for the safe and secure movement of large amounts of currency, and coin, and negotiable instruments, and other items of unusual value.

We perform services for all types of enterprises, large and small, throughout the business and banking community, ranging from Federal Reserve Banks to merchants on the street corner. These customers, both large and small, depend on our companies and our guard employees to protect and transport their moneys and other valuables upon whose movement they are critically dependent from a vault or location within their premises to the vault or secure area of the addressee.

In a separate written statement, we have commented extensively upon section 9(b)(3), its history, and the serious effects S. 1018 would have on our industry and, more importantly, its customers. I respectfully request that this statement be included in the record of this hearing.

Armored car employees have been held time and time again by both the National Labor Relations Board and the courts to be within the scope of section 9(b)(3). Armored car guards in their daily activities move from location to location, however, and are subjected to constant contact with employees of customers who are members of many unions.

As pointed out more fully in our statement, armored car guards, while on customers' premises, operate in all essential respects as if they were directly employed by that customer. History therefore has shown that innumerable problems result should our guard employees' loyalties not remain with our customer, our company, or the proper guard union of their choice.

As discussed in our written statement, by opposing S. 1018, we are not attempting to foreclose a choice of collective bargaining representatives to our industry's guard employees. It is most certainly not our intent to block the process of free collective bargaining.

Ours is not an antilabor industry, for in fact we enjoy excellent relations with a number of proper labor unions throughout this country. The fact is that there are some 10 to 15 unions which represent guard employees exclusively and they are not limited in any way by section 9(b)(3) of the National Labor Relations Act.

The issue here is not a union shop versus a nonunion shop. It is not one of economics, who pays what to whom and what fringes one armored car company gives its employees versus those given by another.

We strongly maintain that history has shown that the proposed amendment to section 9(b)(3) would place the business and financial communities in serious jeopardy. On behalf of the National Armored Car Association and Loomis Armored, Inc., we wish to thank you for the privilege of appearing here today and to express our appreciation for your interested attention.

Thank you.

[The prepared statement of Mr. Bailet follows:]

STATEMENT
by
THE NATIONAL ARMORED CAR ASSOCIATION
on
S. 1018
before the
SUBCOMMITTEE ON LABOR
of the
SENATE
COMMITTEE ON HUMAN RESOURCES

My name is Melvin E. Bailet. I am senior vice president and general counsel of Mayne Nickless Inc. and Loomis Armored Inc. and represent the National Armored Car Association, of which our company is a member.

This association is composed of armored car companies whose operations extend throughout the United States and represent the majority of the armored car volume in this country. Our industry provides a unique and vital service to the commercial life of our nation, since we provide the protective and custodial transportation functions which are necessary for the safe and secure movement of large amounts of currency and coin, negotiable instruments and other items of unusual value. Our customers include every variety of enterprise, large and small, throughout the business and banking communities. These include retail and wholesale establishments, manufacturers, financial institutions (including Federal Reserve Banks), a government (civil and military), service companies and others who entrust to our employees their coin, currency, payrolls, commercial papers and other valuables related thereto, upon whose movement they are critically dependent.

Members of this association have the most serious concerns regarding S. 1018. The armored car industry is uniquely affected by this bill - and it is upon this that we will focus our remarks.

S. 1018 would amend Section 9 (b) (3) of the National Labor Relations Act - the provision which is commonly referred to as the "guard rule". It appears that the drafters of the bill believed that the changes it would make would be consistent with the original intent of Congress in enacting Section 9 (b) (3). What we hope to demonstrate today is that at least as applied to armored car activities this would not be the case, and that there exist very important reasons for maintaining the present rule insofar as our industry is concerned.

Section 9 (b) (3) provides that persons employed as guards may not be included by the National Labor Relations Board in any bargaining unit containing non-guard employees. It further provides that no labor union may be certified by the Board as the bargaining representative of a unit of guards if such organization admits non-guard employees into membership, or is affiliated directly or indirectly with an organization which admits non-guard employees into membership. "Guards", for this purpose, are defined as individuals employed to enforce rules to protect property of the employer or to protect the safety of persons on the employer's premises.

The obvious and oft-stated premise of this provision is that employers are entitled to, and must have, the undivided loyalty of those persons who are responsible for maintaining order and protecting the employer's property.

In a decision issued by the National Labor Relations Board in 1953 - Armored Motor Service Company, Inc., 106 N.L.R.B. 1139 - the Board held that armored car employees come within the scope of Section 9 (b) (3). The Board expressly rejected arguments that the purpose of this provision applies only to those who guard the property or premises of their own employer, and not to those who perform such functions as employees of another employer which provides those services. On the contrary, the Board concluded, the problem of divided loyalty which Section 9 (b) (3) addresses is indeed present in the case of armored car guards. As the Board pointed out:

> "A conflict of loyalty could arise, for example, if the guards should be called upon to deliver money or valuables to one of their customers whose employees were represented by the same union as represented the armored-car guards and the employees of the customer were on strike and picketing the premises of the customer."

Since armored car guards are obviously employed to protect property, the Board considered it irrelevant that the money and valuables which they protect belong not to their own employer but to a customer of their employer.

This decision has since been consistently followed by the Board in numerous instances. See, e.g., Drivers, Chauffeurs, Warehousemen and Helpers, Local 71 (Wells Fargo Armored Service Corporation), 221 N.L.R.B. 1240 (1975); Local 639, International Bhd. of Teamsters (Dunbar Armored Express, Inc.), 211 N.L.R.B. 687 (1974); American Dist. Tel. Co. 160 N.L.R.B. 1130, 1136-37

(1966); Potter Elec. Signal Co., 149 N.L.R.B. 373 (1964); cf. Sentry Investigation Corp., 198 N.L.R.B. 1974 (1972); Bonded Armored Carrier, Inc., 195 N.L.R.B. 346 (1972); Rock-Hills-Uris, Inc., 193 N.L.R.B. 313 (1971). In the course of these decisions the Board has had occasion to point out that its rulings would not exclude armored car guards from the collective bargaining process, since they remain free to choose one of the unions which represents guard employees exclusively. See 211 N.L.R.B. at 689.

The Board's view of Section 9 (b) (3) has been approved by the courts. For example, in 1977 the Court of Appeals for the District of Columbia concluded that the danger of divided loyalty exists where the person charged with protecting the employer's property is employed by another - specifically an armored car service - and pointed out that the legislative history of Section 9 (b) (3) confirmed that view. As the Court noted, the House Committee Report in 1947 had described a "guard" within the purview of this provision as including "any individual employed - to protect property belonging to the employer or property for which the employer is responsible." Drivers, Chauffeurs, Warehousemen & Helpers, Local 71 v. N.L.R.B., 553 F.2d 1368, 1373, n. 7, (D.C. Cir. 1977) (emphasis in original). See also Truck Drivers Local Union No. 807 v. N.L.R.B., 755 F. 2d 5,9 (2d Cir. 1985); Teamsters Local 344 v. N.L.R.B., 568 F. 2d 12, 16 n. 6 (7th Cir. 1977); N.L.R.B. v. American District Telegraph Co. of Pa., 205 F.2d 86 (3d Cir. 1953); N.L.R.B. V. Teamsters Local 671, 398 F. Supp. 243,247-48 (D. Conn. 1975).

This background, we believe, is essential to a full understanding of the implications of the amendment now being proposed to Section 9(b)(3). As we indicated earlier, it is evident that the amendment recognizes, and purports to preserve, the principle that an employer is entitled to the undivided loyalty of those charged with the protection of his property. However, the proposed amendment is premised on the erroneous assumption that this principle can be maintained even where those performing a protective function are members of the same union as non-guard employees just as long as they are employed by separate employers. There is no basis for this assumption, which has consistently been rejected by the Board and the courts, and is plainly unrealistic when applied to armored car services.

The practical fact is that while armored car guards are on a customer's premises they are instructed to and operate in all essential respects as if they were directly employed as that customer's own guards. They are fully responsible for protection of the customer's property the moment it is entrusted to their care and custody by the customer on or within his premises, until it is delivered and signed for by the designated consignee on or within the latter's premises. Our employees often take over the total responsibility for security of certain areas of the customer's premises for as long as is necessary to deliver or to pick up and remove the customer's valuables. Where payroll deliveries are involved they are often assigned to stand guard while pay envelopes are being distributed.

In short, as the Board and the courts have previously recognized, every reason for applying section 9 (b) (3) to an establishment's own guard force has equal application to those armored car service guards who provide similar protective services for the property of that establishment. If armored car service employees are members of the same union as the non-guard employees of a customer, the same threat of divided loyalty exists, and the same consequences will most assuredly result if that threat is realized. For example, if armored car employees refuse to cross the picket lines of fellow union members, the cash on hand at a particular facility - e.g., a retail store - could simply not be picked up and transported under safe conditions. Such a situation obviously encourages attemps at theft - with consequent risks of force and violence.

In addition, when large amounts of cash are on hand companies are invariably forced into trying to transport the cash themselves, induced by the desire to remove the money from their premises and by the need to deposit it so that checks may be written. Such self-help efforts have been disastrous. Armed robberies of businessmen attempting to bring cash to the bank have now become so commonplace that many now hire armored car services to transport their money to a bank in their same shopping center - sometimes no further away than across the sidewalk.

It is not mere speculation that armored car guards will refuse to perform their duties where picket lines have been set up by fellow union members at a customer's premises. Not only has the Board concluded that this would be the likely result, but the experience of members of our industry is most instructive on this score. For example, when pickets at a terminal of one ot our members in Minneapolis began threatening persons and destroying property during a strike in 1976 the local police were called to restore order and prevent further damage. The police, who were members of the striking union, failed to respond immediately and were casual in the execution of their police duties. The violence continued unabated.

If even the police will not perform their public duty to safeguard an employer's employees and property when fellow union members are involved it is clear that we cannot realistically expect armored car guards to do so. Thus, the purpose of Section 9(b)(3) of assuring that those responsible for protecting an employer's employees and property will have undivided commitment to that objective will be very substantially undermined if this amendment is adopted.

It should be emphasized, as the Board has already explained, that Section 9(b)(3) does not have the effect of foreclosing a choice of collective bargaining representatives to armored car guards. The fact is that there are a number of unions which represent guard employees exclusively, and those unions are in no way limited by Section 9(b)(3).

Accordingly, Section 9(b)(3) as presently written does not constitute a roadblock to exercise of freedom of choice or thwart the process of free collective bargaining, as has been alleged. Amendment of that provision, however, in the manner suggested by S.1018 would place in serious jeopardy the ability of the business and financial community to provide for the protection of property. We therefore urge that the proposed amendment be rejected.

Senator NICKLES. Several of you represent companies or work with companies that are in the armored car business. Mr. Yost, you mentioned yours. How large is your company?

Mr. YOST. Senator, we operate in two cities. We operate about 20 vehicles

Senator NICKLES.What two cities?

Mr. YOST. Columbus, OH and Dayton, OH. We have a small office up in Toledo, but that is relatively small.

Senator NICKLES. Were you represented by the Teamsters previously?

Mr. YOST. No, sir; we never were represented by the Teamsters.

Senator NICKLES. Have you decertified recently or changed into a nonunion status in your company?

Mr. YOST. Our people in our Dayton office have deauthorized the union they belonged to; yes, sir.

Senator NICKLES. Are your drivers unionized?

Mr. YOST. None of them are unionized at this point.

Senator NICKLES. I will ask this question to any of the panel. Do you think you would encounter a problem if you had your drivers represented or members of the union trying to cross a picket line? I could say any picket line, but possibly a picket line of the same union?

Mr. PAGANO. I can answer that. For Brinks, where we did have many collective bargaining relationships throughout the country historically with the Teamsters, the bottom line is that we always had problems. As was testified by Mr. Hucke, representing the Teamsters in Chicago, the decision as to whether employees would cross picket lines was made by the joint council of the Teamsters, it was not made by what the employers' needs were who was employing the guards or what the needs were from the customers' point of view. The decision was made by the teamsters and oftentimes that was used to whipsaw other concessions either from Brinks or on behalf of the customers' employees and, indeed, that is the reason why we withdrew recognition, it was precisely because of the divided loyalty dilemma which was just so apparent.

Senator NICKLES. Did the divided loyalty problem occur in several places throughout the country or did it only apply, say, in Chicago or Cleveland?

Mr. PAGANO. No; the Teamsters, as a matter of course, as I recall at least from my experience with them, take an oath, to brother Teamsters that they are to respect each other's picket lines, and it is only the extreme exception where one Teamster will walk through another Teamster's picket line, and that practice follows into other nonguard unions as well.

To answer your question, it happened throughout the United States, without exception. However, there may have been occasions when we were able to preempt the issue by having management take the run out instead, but the bottom-line analysis is that in the vast majority, if not 99 percent of the times, a picket line was respected, a Teamster picket line, or a picket line by another nonguard union which was accepted or acknowledged by the joint council in the particular area.

Senator NICKLES. A possible example was mentioned of having a supervisor cross the line. In many cases where you are talking about armored cars, aren't you usually talking about somebody who is armed, carrying a considerable amount of valuables? Is sticking managment into those situations always the safest thing to do? Maybe they are not trained, or have not been on the firing line, or do not know how to use weapons. A weapon might become a very dangerous instrument for them and for anyone else that happens to be in the vicinity?

Mr. PAGANO. You are absolutely right. In fact, the people who are most trained are obviously the people who are most aware and sensitive to what happens on the street.

Our management personnel, of course, are inside all the time, and if you have ever been into a Brinks facility, you on exception see the light of day. So you are inside, you are protected. To send out a management person is to really send out someone who is much less qualified than a normal employee to accomplish our objective, and that is to guard the property of the customer and Brinks.

Senator NICKLES. And management would also be sent out, I am assuming on this kind of scenario, in a much more tension-build environment.

Mr. PAGANO. Yes; that is precisely the time when we need every bit of experience that a person has and it is precisely the time that we do not have it.

Senator NICKLES. You mentioned Brinks had a long affiliation with the Teamsters. You have now disassociated due to this. When did Brinks break off with the Teamsters?

Mr. PAGANO. Well, it is not a question of breaking off. The withdrawal from the Teamsters happened concerning 9(b)(3) where we felt at least with new management that Congress, the National Armored Car Association, as well as the Board and Federal courts were right, that one of the reasons why Brinks had so many problems was because our employees were continually confronted with the divided loyalty problem.

Historically, the Board has allowed a withdrawal of recognition since the late forties of any unit that was inappropriate. So Brinks could have withdrawn consistent with Senator Murray's statements in 1947 that there would be a one-time disruption It was not until prior management—and I mean prior, the company has changed dramatically—it was not until new management reviewed the situation and recognized that it was the divided loyalty dilemma that in the early eighties they decided to exercise their right consistent with the original legislation, and as a result since I would say 1982 through first quarter 1985 we have withdrawn at close to 20 locations and approximately 60 locations up to this day.

Senator NICKLES. Mr. de Bernardo, you mentioned your concern about organized crime infiltrating some areas of some locals, and there have been reports of it. We have had hearings in our committee, as well as the Permanent Subcommittee on Investigations. We passed the Labor Management Racketeering Act, which we worked on for about 2 years, where we held hearings with regard to problems in some locals with certain individuals.

Do you find that possibly in certain cities where they have had that problem, it could exacerbate an employer's dilemma of needing to move valuables, money, et cetera, if they knew there was past or possible present connection with organized crime?

Mr. DE BERNARDO. I think that is absolutely correct, Senator. It is our feeling that this is a threat to the business community, that no function is more important than the protection of those valuables and protection of the people as well. In fact, based on the report from the President's Commission and again the report and testimony of the FBI, it seems clear that there—well, they mentioned four international unions which are most frequently associated with organized crime.

I should point out that the inspector general of the Department of Labor mentions in a report in 1981 that there were 400 local unions that had ties to organized crime.

Senator NICKLES. The inspector general of the Department of Labor said what?

Mr. DE BERNARDO. In 1981 said there were 400 local unions that had ties to organized crime. Sure, the business community recognizes this as a real threat.

Senator NICKLES. You mentioned 400 locals and you also mentioned four internationals?

Mr. DE BERNARDO. The President's commission said that there are four unions that are most frequently associated with organized crime, the International Brotherhood of Teamsters' the Laborers International Union, the International Longshoremen's Association, and the Hotel Employees & Restaurant Employees International Union.

I guess the most direct concern of the business community is the International Brotherhood of Teamsters because they have a nexus in terms of the occupational nexus in terms of drivers and the fact that they have been so active in trying to organize guards, armored car guards, career personnel in the past.

I think it is also important to point out that in 1983 the Wharton School, the University of Pennsylvania, published a report on labor violence and they found that by a wide margin the Teamsters, the union that is most violent and most active in perpetrating extortion, to subject employers to increased extortion behavior, embezzlement, bribery, theft, price fixing, restraint of trade, those are the areas that the President's Commission identified as areas where organized crime figures tried to exert through domination of unions leverage on both employers and employees.

Senator NICKLES. We are not having a hearing on that report, but I am interested in how that would apply as far as the drivers. Thank you for your comments.

Mr. Bailet, have some of the companies in Seattle, as far as representation, had a problem?

Mr. BAILET. Well, I think, Senator, the industry in Seattle is composed of three companies. Several of those companies are here represented and they have withdrawn recognition.

Senator NICKLES. They have or have not?

Mr. BAILET. They have withdrawn recognition from the Teamsters.

Senator NICKLES. How many employees altogether have been affected?

Mr. **Bailet**. I would have to guess, maybe 300 at best, if that minimum.

Senator **Nickles**. Are they nonunion now?

Mr. **Bailet**. I know that our company is organized by a guard union and I believe recently that employee body decertified that guard union, so probably at this time they are not.

Senator **Nickles**. Thank you very much for your comments. To all of the panelists, I appreciate your presentations.

Our next panel consists of James McGahey, president of United Plant Guards Workers of America, from Michigan; and Richard Cordtz, international secretary treasurer of Service Employees International.

STATEMENT OF GORDON A. GREGORY, GENERAL COUNSEL, INTERNATIONAL UNION, UNITED PLANT GUARDS WORKERS OF AMERICA [UPGWA], ACCOMPANIED BY JACK RUSSELL, ADMINISTRATIVE ASSISTANT TO PRESIDENT McGAHEY; AND JAMES G. O'HARA, WASHINGTON COUNSEL; AND RICHARD W. CORDTZ, INTERNATIONAL SECRETARY TREASURER, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ACCOMPANIED BY PEGGY CONNERTON, CHIEF ECONOMIST

Mr. **Gregory**. Mr. Chairman, my name is Gordon A. Gregory and I am general counsel of the UPGWA' substituting for President McGahey.

Senator, with me this morning, to the left, is Jack Russell, the administrative assistant to the international president, and to my right our Washington counsel, James G. O'Hara.

President McGahey sends his regrets that he was unable to be here personally. He has, of course, submitted a statement and you have indicated that it will be part of the record.

I will attempt to avoid any repetition of that statement. Let me begin by indicating that the UPGWA, founded in 1948 as a consequence of section 9(b)(3), is to our knowledge the oldest continuous, the largest, strongest guard union in the United States. We have members throughout the United States, Canada, and Puerto Rico, as indicated in the paper, in all major industries, businesses, including auto, steel, the nuclear industry, defense, and so forth.

Let me get right to the point as to why our Union opposes S. 1018. It appears from testimony given thus far in this proceeding that certain labor organizations, which would benefit from the bill as expressed in its stated purpose, is the Teamsters Union and the focus is on armed courier guards or armored car drivers.

Let me point out, however, Senator, that S. 1018 goes far beyond any purpose to serve the special interests of the Teamsters Union. Effectively, the bill would repeal section 9(b)(3) with respect to a majority of guard employees throughout the United States. Or union indeed is composed of traditional plant guards. First, we know what a plant is and if we define a plant guard as perhaps an in-house guard, at General Motors Corp., Chrysler, Ford, well, indeed we do represent plant guard employees.

However, since the term is not defined in the bill, but supposing it has the traditional definition, then the numerous guards that we represent or indeed onorganized guards throughout the country at nuclear sites, at the Kennedy Space Center, at defense locations, at educational institutions, businesses, both retail and wholesale, in effect all of those guards, albeit they are guards as currently defined in section 9(b)(3), would be excluded from the proscriptions of section 9(b)(3) in two respects.

First, the Board technically would not be compelled to find only guard units as appropriate for purposes of collective bargaining; second, of course, the proscription that nonguard or mixed guard unions could be certified for guard employees would be entirely removed.

We think the bill goes much too far in that respect, particularly based upon the almost 40 years of experience we have had under the act.

Now, we take the position in terms of the interest of the UPGWA that it has proven its effective ability to represent security personnel as defined in the act. Passage of the bill would effectively result in substantial raids upon our membership.

Throughout all these years, the UPGWA literally has been a Caesar's wife with respect to restricting its memberships to guards. With the removal of the present proscription and the limitation of plant guard, we would then have to maintain our nonaffiliation directly or indirectly with the labor movement in an effort to protect the jurisdiction over plant guards and thus give up the substantial portion of our membership which are not traditionally defined plant guards, or if we did then become a mixed guard union we, the longest, oldest established union, could no longer be certified as a plant guard union.

Senator NICKLES. You would get hit both ways.

Mr. GREGORY. Indeed. It would be, if you will, a real Hobson's choice and these are matters we set forth in our paper, not necessarily in a self interest, although I would be less than candid to suggest that any labor organization does not protect its jurisdiction, that is true obviously of the purpose of the Teamster presentation and the one I am sure we are about to hear.

Suffice it to say then, Senator, we vigorously oppose S. 1018. There has been a perennial effort to amend 9(b)(3), and the problem as we see it is not 9(b)(3) with respect to the organizing of security personnel. The problem as the entire labor movement knows stems from other problems with the Taft-Hartley Act, including its current administration. And while I am exceeding the scope of the bill before you, let me make it clear that the UPGWA has the same problems as the balance of the labor movement and when we are going to start reforming the act, let us do it in terms of protecting the section 7 rights of employees, rather than create two classes of guards that will cause all the problems set forth in our statement.

[The prepared statement of Mr. McGahey follows:]

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STATEMENT OF JAMES C. McGAHEY, PRESIDENT INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA)

TO

THE SENATE SUBCOMMITTEE ON LABOR OF
THE COMMITTEE ON LABOR AND HUMAN RESOURCES

IN

OPPOSITION TO S. 1018
TO AMEND THE NATIONAL LABOR RELATIONS ACT

April 24, 1986
Washington, D.C.

As President of the International Union, United Plant Guard Workers of America (UPGWA), I must vigorously oppose the proposed amendment to Section 9(b)(3) of the National Labor Relations Act. S. 1018 proposes changes that are antithetical to the original legislative philosophy and intent of the Act, and its promotion of industrial stability. For this reason, I respectfully urge that all members of the Committee reject the Bill.

The International Union, United Plant Guard Workers of America (UPGWA) was founded on February 17, 1948 and has become the world's largest Union devoted to the representation of guards and security employees exclusively. Our Union represents industrial and agency guards in almost every major industry and at numerous Government installations. In addition, we have a substantial membership in Canada. Throughout the years we have negotiated successive National Bargaining Agreements with General Motors Corporation, Chrysler Corporation, Ford Motor Company, American Motors Corporation, and other major corporations. Many of our collective bargaining units are at Government facilities; such as the Kennedy Space Center, Mississippi Test Site, Michoud Assembly and with defense contractors such as Boeing, McDonnell-Douglas and General Dynamics, to name only a few.

Our Union did not seek the initial enactment of Section 9(b)(3). We were the product of it. Prior to 1947, the core of what was to become the UPGWA was known as Local 114, UAW. In 1947 the labor movement did not seem unduly disturbed about Section 9(b)(3). Industrial guards were regarded as representatives of management. Indeed, the original House Bill would have included guards within the definition of "supervisor." The compromise, of course, was to place guards in separate bargaining units and separate guard unions. Thus we were left to our own devices and resources to form an international guard union.

Despite our statutory exile from the house of labor, the UPGWA has always enjoyed a close relationship with leaders of the AFL-CIO and its affiliated unions. Since our heritage is with the UAW, the UPGWA has always maintained a pattern of support and cooperation with that Union. Although we must presently avoid any affiliation, directly or indirectly with an organization which admits to membership employees other than guards, our Union has achieved international union status and has accepted and performed a significant role in the labor movement.

Since its enactment in 1947, the philosophy of Section 9(b)(3) has proven workable and effective. Guard employees have unique and special hours and other terms and conditions of employment. The National Labor Relations Act has, of course, recognized the special community of interest enjoyed by guard employees and has, therefore, directed that guards be placed in separate bargaining units. This rule has resulted in a stability and continuity of labor relations not always enjoyed by other bargaining units of employees. For example, guard units are not subject to NLRB

When the word addition is placed in context, it is evident that statutory repeal, not clarification, is involved. First, the word "guard" is now expressly defined in Section 9(b)(3) as an individual who enforces rules to protect property or to protect the safety of persons. The definition has been consistently interpreted and applied by the Board irrespective of job titles such as plant guard, security officer, private police officer, security inspector, watchman, etc.. Thus the addition of the word "plant" is one of limitation not clarification.

Second, by establishing the undefined classification of "plant guard" the Bill would permit all other "guards" to be in bargaining units with non-guards. Currently the Board cannot find an appropriate unit or certify a union for a mixed unit of guards and non-guards.

Third, S. 1018 does not define "plant" or "plant guard." If the Bill's proponents intend that "plant" means a traditional manufacturing enterprise (General Motors, U.S. Steel), and "plant guard" means in-house guards at a traditional plant, then the vast majority of "guards" in this country would be excluded from Section 9(b)(3). Large guard agencies, such as Pinkerton, Burns, Wackenhut and many others, employ more guards nationwide than could be considered "plant guards" in the traditional sense. Such agencies have accounts with numerous "plants." Under the proposed amendment, would agency guards assigned to "plants" be "plant guards"? Since they are not employed directly by the petitions for craft or departmental severance. The maintenance of guards in separate bargaining units and unions has avoided conflicts of interest between the enforcement of plant rules and the obligations of union membership. Equally, conflicts of interest have been avoided in strikes and other labor disputes while preserving the rights of the respective parties. Since industrial crime and terrorism is on he increase, the need for a separate identity of guard employees is even more apparent.

The ostensible purpose of S. 1018 is stated as follows:

> "To amend the National Labor Relations Act *to clarify the meaning of the term 'guard'* for the purpose of *permitting certain labor organizations to be certified* by the National Labor Relations Board as representatives of *employees other than plant guards.*" (Emphasis added).

Notwithstanding its clear special interest to favor "certain [but unnamed] labor organizations," the Bill does not in fact "clarify the meaning of the term 'guard' . . . ." The proposed amendment seems innoxious in that it would simply add the word "plant" before "guard" wherever the latter word appears in the statute. The effect of such change is more readily apparent when shown in Section 9(b)(3) as follows:

> "Provided, that the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a [plant] guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of [plant] guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than [plant] guards."

"plant" owner/employer, and may be assigned periodically to non-plant facilities, it is arguable that they are not "plant guards," and therefore excluded from Section 9(b)(3).

The UPGWA represents both in-house and agency guards at diverse plants, facilities and installations throughout the United States. Our exclusive jurisdiction is statutory "guards" irrespective of industry, business, facility or employer. We represent guards in manufacturing, mining, milling, retail, entertainment, education, aerospace, transportation, defense, government and many other industries. Some are traditional plant guards, most are not. For example, we represent guards at the Kennedy Space Center and Patrick Air Force Base. At the Space Center, NASA contracts security services to EG & G of Florida. Is the Space Center a "plant" and are the agency guards "plant guards"? If not, then the Bill would permit such guards to be in a bargaining unit with non-guards, and to be represented by a non-guard union. The same questions could be asked of Patrick Air Force Base where Pan Am World Services contracts with the U.S. Air Force to provide both housekeeping and security services. If the Base is not a "plant," and Pan Am's security officers are not "plant guards," then Pan Am could have a mixed unit of guards and non-guards represented by a non-guard union such as the Teamsters or Transport Workers.

Several other examples are appropriate to illustrate the problems created by the proposal that only "plant guards" be subject to Section 9(b)(3). The UPGWA currently represents numerous security guards at facilities and installations which are owned, controlled or licensed by government agencies such as NASA, DOE, DOD, NRC, or various branches of the military service. At Argonne Laboratory in Chicago, the UPGWA represents a highly trained and professional security force which is employed directly by Argonne under license from the DOE. Is Argonne a "plant," and are its security officers "plant guards." Probably not in the traditional sense. Thus if Section 9(b)(3) were amended as proposed by S. 1018, such security officers could be represented by any union, including the union that represents non-guard employees at the laboratory.

A similar situation is presented at the Idaho National Engineering Laboratory. Here DOE contracts directly with American Protective Services for security personnel and service. The UPGWA is the exclusive collective bargaining of such security personnel. Again, if such security officers are not "plant guards," they could be represented by any labor organization in any unit as proposed by S. 1018.

The examples could be expanded. Suffice it to say that the UPGWA represents statutory guards at numerous military, space, and defense installations throughout the country. The security personnel at such facilities are not traditional "plant guards." They are highly trained, dedicated and motivated professionals who are prepared to meet the current challenges of terrorism, sabotage and treason. S. 1018, however, would destroy the stability and community of interest created by Section 9(b)(3) by permitting such statutory guards to be in mixed bargaining units with representation by non-guard unions.

Fourth, S. 1018 would effectively repeal the current proscription of Section 9(b)(3) that the NLRB will *not* certify a labor organization which admits non-guards to membership or is affiliated directly or indirectly with an organization which admits to membership employees other than guards. The Bill proposes that *any* labor organization could be certified as the bargaining representative of *any* guards *other than "plant guards."* Since the Bill does not change the definition of "guard," and since most statutory guards are not what is commonly considered a "plant guard," the proposed amendment would emasculate Section 9(b)(3). Contrary to thirty-nine (39) years of established federal labor policy, all statutory non-"plant guards" would be subject to raid by rival labor organizations, inclusion in guard/non-guard units, and representation by non-guard unions. There are no compelling needs or reasons to amend Section 9(b)(3) to favor "certain labor organizations." The amendment proposed by S. 1018 would seriously affect the stability of the security industry, and produce years of litigation as NLRB attempted to define and refine the term "plant guard."

Recently the NLRB placed its guard representation policy in harmony with the legislative intent of Section 9(b)(3). In

University of Chicago, 272 NLRB No. 126, 117 LRRM 1377 (1984) it was held that a guard/non-guard union is barred from intervening in an election for a guard unit. The Board stated in relevant part as follows:

> "As enacted, Section 9(b)(3) applies both to mixed units of guards and other employees and to guard-nonguard unions. The statute renders the former inherently inappropriate, and proscribes the Board from certifying the latter. Although the provision addresses two different situations, we conclude that, given the purpose underlying its enactment, Section 9(b)(3) was intended to achieve a uniform result. Thus, we find no basis for distinguishing between the degree of exclusion to be applied to a mixed unit and that to be applied to a guard-nonguard union. Such a distinction is at odds with the fundamental purpose of Section 9(b)(3) inasmuch as it permits a guard-nonguard union to attain indirectly that which it cannot attain directly, that is, a place on the ballot in the Board conducted election. Moreover, it can scarcely be gainsaid that placing a guard-nonguard union on the ballot contributes to a result antithetical to the legislative history of Section 9(b)(3). Clearly, this practice creates the false impression that the guard-nonguard union is equally as capable of securing the protections of the Act as other candidates on the same ballot. As we noted in Brink's, supra, we shall not, indeed cannot, sanction a practice which utilizes Board processes in furtherance of an end which a specific provision of the Act was plainly intended to discourage.
>
> Thus, we construe Section 9(b)(3) not only to bar the formality of certification, but also to preclude a disqualified labor organization from taking advantage of the Board's election processes, including the privilege of being placed on the ballot as an intervenor with an accompanying certification of the arithmetical results. Therefore, we hereby overrule Burns II, Bally's Park Place, and their progeny." (117 LRRM 1379-1381, Emphasis added).

Also, to the same effect is Board policy set forth in Brink's, Inc., 272 NLRB No. 125, 117 LRRM 1385 (1984) and Wells Fargo Armored Service Corp., 270 NLRB No. 106, 116 LRRM 1129 (1984).

S. 1018, of course, goes far beyond any overruling of the Board's decision in University of Chicago, supra. It would permit the Board to certify non or mixed guard unions as the bargaining representative of any statutory guards other than "plant guards." The amendment would clearly repeal the legislative intent expressed by Senator Taft as follows:

> " . . . Under the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act, but the Board is instructed not to place them in the same bargaining unit with other employees, or to certify as bargaining representatives for the guards a union which admits other employees to membership or is affiliated directly or indirectly with labor organizations admitting employees other than guards to membership." (93 Cong. Rec. S6444 (1947)).

The proposed amendment to 9(b)(3) does not protect individual guard employees, but rather will produce litigation and instability of the security industry. Some proponents of the amendment may suggest that guards will be granted a greater freedom of association. Such a claim is erroneous. Statutory "guards" now enjoy Section 7 rights of the Act to form, join, or assist labor organizations, and to bargain collectively. S. 1018 does not expand those rights but creates two classes of statutory guards - "plant guards" and all other guards. While it is true that Section 9(b)(3) directs the establishment of "guard" units only, and the certification of "guard" unions only, guard employees do have a freedom of choice to join or form such unions.

Our national labor policy recognizes the traditional jurisdictions of labor organizations on the basis of appropriate bargaining units determined by craft, occupation or profession. Accordingly, the non-guard painter, carpenter, bricklayer, plumber, etc. is for all practical purposes in the same position as a statutory guard regarding the selection of a bargaining representative. Indeed, the AFL-CIO recently adopted comprehensive mediation-arbitration procedures to remedy divisive organizing and jurisdictional disputes among its affiliates. And finally on this point, it should be noted that there is no evidence that statutory "guards" individually or collectively seek amendment of Section 9(b)(3) as proposed by S. 1018.

Our critics will undoubtedly contend that the UPGWA is selfishly motivated, and that we seek only to preserve our jurisdiction. Our answer is clear. We seek only to protect and advance the rights of guard employees. The occupation and profession of security guards will not gain from the amendment contained in S. 1018.

As noted at the outset, the UPGWA did not sponsor or support the original 9(b)(3) in 1947. We were temporarily orphaned by it. We survived and grew however because of an ability to recognize and deal with the special problems and needs of security guards. This has been accomplished in accordance with the finest traditions of trade unionism and consistent with sound labor relations policy. We view the proposed amendment of 9(b)(3) as destructive of 39 years of progress in the exclusive representation of guards.

S. 1018 does not address any compelling problem of employee representation or labor relations. Moreover, the proponents of the Bill can offer no cogent reasons for the adoption of such special legislation. Piecemeal amendment of the National Labor Relations Act is unwarranted and pernicious. There are compelling reasons to reform the Act, but Section 9(b)(3) is not among them as proposed by the instant Bill. S. 1018 must be rejected.

Respectfully submitted,

James McGahey

JAMES C. McGAHEY, President
International Union, UPGWA

JCM/GAG/pmr
4/15/86

Senator **Nickles**. Thank you very much for your comments.

Our next panelist is Richard Cordtz, international secretary-treasurer, from Washington, DC, of the Service Employees International Union.

Mr. **Cordtz**. Thank you, Mr. Chairman. I would just like to introduce to my left here, Peggy Connerton, our chief economist.

Mr. Chairman, my name is Richard Cordtz, and I am the international secretary-treasurer of the Service Employees International Union. Our union has 850,000 members, of which 20,000 work in positions which the National Labor Relations Board currently defines as guards.

I would like to draw upon my union's experience with section 9(b)(3) under the National Labor Relations Act. This experience shows that this provision restricting the right of guards to freely choose their bargaining agent is outdated, totally unnecessary, and even counterproductive.

At this time I ask that my full statement be submitted for the record and say that we believe that S. 1018 is not only an important first step and we are in support of the same, but it does not really solve the problem.

The history of the guard section is instructive. Specifically, Congress sought to apply section 9(b)(3) to a unique situation in manufacturing plants where guards, deputized and armed and charged with protecting the employer's property against strikers. Congress was concerned that these deputized guards not face a conflict of allegiance between their bosses and Federal workers. The situation allegedly made more likely if both belonged to the same union.

Looking at employers who have voluntarily recognized our union to represent all nonsupervisory workers, including guards, shows that this divided loyalty problem is more fiction than fact.

For example, SEIU's Local 73 in Chicago represents 6,000 guards working mostly for security contractors. The guards often work at the same buildings where there are other SEIU members. The dire consequences feared because these guards were protecting employer's property and our members of a mixed union has simply not occurred. At the same time these guards benefit from representation by the union of their choice.

Another example is the 4,000 security guards working at racetracks, stadiums, amusement parks, and theaters and other recreational industries where we represent 21,000 people. Once again, the consequences predicted by the divided loyalty problem are nonexistent.

Not only is the guard section ineffective, it harms American workers. This provision has become a misguided tool by which employers can deny or limit the rights of a growing segment of service employees.

For example, adverse court decisions have become a vehicle by which security guard contractors compete in the marketplace by eliminating unions and cutting wages. Take K-Securities which withdrew recognition for 110 guards from one of our locals, relying on recent NLRB cases. These workers currently have no union at all. As a result, they now earn close to the minimum wage and have no benefits.

This strategy by the industry to create low-pay jobs with high turnover will backfire. In the future, security contractors will provide less protection of the employer's property because they do not have a skilled motivated workforce. This runs directly counter to the explicit intent of Congress.

Moreover, the Labor Board has expanded the definition of a guard far beyond the original intent of Congress. Guards now include not only the manufacturing plant guards but also armored car drivers, couriers, door attendants, elevator starters, hatcheck attendants, and even some janitors. While their jobs involve to some degree safeguarding the employer's property, the same could be said of virtually any employee.

Take the example of Mr. Ortez in New York City. He worked as a janitor in an apartment building 4 days a week. One day a week he sat in the lobby and opened the door for guests. The Board denied him the union representation given his fellow maintenance workers. There is a strong economic incentive for employers to classify janitors as guards. The average hourly rate for union janitors in New York City is $10.23 an hour compared to $4.18 an hour for unorganized security guards.

In addition, these workers often lose their health benefits. Finally, no independent union is going to try to organize a single door attendant or hatcheck person in a building. The organizing and service costs are just too high. Down the road, the Board's expansionist policies will see to it that store clerks watching for shoplifting and building service workers carrying keys to the supply room are prevented from joining nonguard unions.

In short, section 9(b)(3) has outlived its useful purpose. Instead, it has become an antiworker tool by which employers deny employees fair representation and slash wages and benefits. It is also making the security industry less secure both for employees and plants. We believe that S. 1018 is a first step in the right direction. However, it does not solve the problem. At a minimum, we need to clarify the meaning of the term "guard" to exclude employees whose primary duty does not involve safeguarding the employer's property.

We further urge this subcommittee to seriously consider whether repeal of the guard provision is not the best public policy. We have already waited too long to place guards on the same footing with the rest of the American workforce.

On behalf of these employees and their families, let us wait no longer.

Thank you, Senator.

[The prepared statement of Mr. Cordtz follows:]

STATEMENT OF RICHARD W. CORDTZ
INTERNATIONAL SECRETARY-TREASURER
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC

My name is Richard W. Cordtz and I am the International Secretary-Treasurer of the Service Employees International Union. Our union has 850,000 members. About 15,000 of these workers are employed as guards primarily for security firms and for employers in the amusement and other recreational industries. Another 5,000 are lobby attendants, door persons and other building service workers in positions which the National Labor Relations Board currently regards as "guards".

This designation has serious consequences under Section 9(b)(3) of the National Labor Relations Act. Any union which is not solely comprised of guards has no statutory right to organize "guard" employees. And conversely, workers labeled as "guards" cannot choose freely a bargaining representative. As a result, they are denied basic rights and benefits accorded to all other employees covered by the National Labor Relations Act. These employees are nothing short of "second class" citizens when it comes to union representation and collective bargaining.

My purpose in testifying today is to ask this Subcommittee to correct the injustice and to place guards on the same footing as all other employees for purposes of the National Labor Relations Act. S. 1018, by restricting Section 9(b)(3) to "plant" guards, is a laudable "first step" in this direction. This change would once again grant armored car drivers, couriers, and certain other service employees the right to choose the union which can best represent their needs.

However, it is not enough. At a minimum, we must further clarify the meaning of the term "guard" to exclude workers whose primary job duties are not to protect employers' property.

Ultimately, we believe that workers would be best served by the wholesale repeal of Section 9(b)(3). This provision is outdated and does not reflect the current state of labor-management relations. It was adopted in the immediate post-war period to remedy a special situation which arose out of the experience in World War II, a background which I believe is no longer relevant.

The history of Section 9(b)(3) is rather strange. Section 9(b)(3) was adopted as a legislative response to the Supreme Court decision in Jones & Laughlin Steel v. N.L.R.B. which was a 5-4 ruling handed down on May 19, 1947. The Supreme Court held that there was nothing in the Wagner Act which prohibited deputized, and I emphasize the word deputized, plant guards from being represented by the same organization that represented production and maintenance employees at a plant engaged, as most of the industrial capacity of the United States was during World War II, in war-related production. In this case, the Supreme Court reversed the Sixth Circuit Court of Appeals which held the inclusion of guards in a unit of production and maintenance employees represented by the same union to be contrary to military necessity.

Continuing concerns for national security and labor strife in the steel and mining industries in the immediate post-war period prompted Congress, in its deliberations on the Taft-Hartley Act, to overturn the Supreme Court's decision. A careful reading of the legislative history shows that Section 9(b)(3) was designed as an extremely narrow exception to the nation's general labor policy of free choice of union representation. Specifically, I believe it was designed only for manufacturing plant guards, who were deputized and who protected plants deemed "critical" for national security reasons.

Section 9(b)(3) provides that the Labor Board cannot find any bargaining unit to be appropriate:

> "... if it includes together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises;"

It also provides that the Labor Board is prohibited from certifying a labor organization as a representative of employees for a unit of guards if the organization admits to membership or is affiliated "directly or indirectly" with an organization which admits to membership employees other than guards.

Despite these restrictions, the Labor Board asserts that guards are entitled to receive the same rights and benefits as other employees covered by the Act. Although I agree with the Board that guards are entitled to all of the same rights and benefits, I assure you that employees who are regarded by the Board to be "guards" do not, in fact, receive them. Nor will they as long as Section 9(b)(3) -- at least in its current form -- remains a part of the National Labor Relations Act.

Moreover, the Labor Board has expanded the definition of a "guard" far beyond the original intent of Congress. Guards now include not only the manufacturing plant guards, but also watchmen, contract security employees, armored car drivers, couriers, door attendants, elevator starters, hat check attendants, receiving clerks and even some janitors. All of these employees have been erroneously brought within the coverage of Section 9(b)(3) simply because their job involves to some degree safeguarding the employer's property. The same could be said of virtually any employee.

This is a far cry from the provision's initial purpose and scope. Section 9(b)(3) was never intended to cover employees other than manufacturing plant guards.

Modifying the language of Section 9(b)(3) to apply only to "plant guards" and not simply to "guards" would restore fair representation to some employees. However, many others would still be denied basic rights under the National Labor Relations Act.

The National Labor Relations Act has become a misguided tool by which employers can deny or limit the rights of a growing segment of service employees. As the Labor Board continually expands the list of jobs which it considers as "guard" positions, more and more employees no longer have access to full and fair collective bargaining, which was the intent of the National Labor Relations Act.

Take the example provided by a recent NLRB decision in New

York City. One of our members, Mr. Ortiz, worked as a janitor in an apartment building four days a week. One day a week he sat in the lobby and opened the door for guests. The Board ruled that his "guard" duties, even though he spends only one-fifth of his time at the desk, were sufficient to exclude him from the bargaining unit. He was therefore denied the union representation given his fellow maintenance workers.

There is a strong economic incentive for employers to classify janitors as guards. The average hourly rate for union janitors in New York is $10.23, compared to $4.18 for unorganized security guards. In addition, these workers who are kicked out of our bargaining units often lose their health and welfare benefits.

Down the road, the Board's expansionist policies will see to it that store clerks watching for shoplifting, waitresses making sure customers pay their checks, and building service workers carrying keys to the supply room are prevented from joining non-guard unions.

Under Section 9(b)(3), even true guards have an unfair choice -- that is, essentially no choice. They must be represented by a guards-only union, which is generally small and has limited resources to devote to the often long and expensive process of establishing collective bargaining. Where the employees want a "mixed guard" union, they must rely upon the "good graces" of their employer to grant voluntary recognition, because "mixed guard" unions cannot be certified as the exclusive representatives of guards under Section 9(b)(3). Of course, the

Labor Board allows the employer to withdraw recognition at any point during the negotiations.

Fortunately, many of our employers have long histories of voluntarily recognizing our union to represent all nonsupervisory workers in their establishments, including so-called "guards". However, these agreements are now threatened as competitors use adverse Board decisions to deny their workers "free choice" of union representation and to obtain an unfair economic advantage. To compete, our employers are increasingly following this route.

For example, K-Securities withdrew recognition for 110 "guards" from one of our locals, relying on recent NLRB cases. These workers currently have no union. In short, "guards" need the protections afforded other workers which can only be provided by effective collective bargaining. Guards have been "second class" citizens long enough.

Consequently, I urge you -- at a minimum -- to revise Section 9(b)(3) to further clarify the meaning of the term "guard" to exclude workers whose primary job duties do not include the protection of the employer's property. This modification would, at least, restore the initial scope of the provision and return watchmen, door attendants, couriers and others to their proper non-guard status.

Ultimately, we believe, however, that even these changes are not enough. Therefore, we urge this Subcommittee to consider whether outright repeal of Section 9(b)(3) is the more appropriate public policy. Frankly, Section 9(b)(3) is outdated. It was a response to a unique situation and not the "inherent" nature of guard duties which prompted this provision. Times have changed. The concerns which Section 9(b)(3) was designed to address no longer exist. We have already waited too long to place guards on the same footing with the rest of the American workforce. On behalf of these employees and their families, let us wait no longer.

Senator NICKLES. Mr. Cordtz, thank you for your comments. I appreciate the efforts of all of the participants in the hearing today in representing their members. I can see very evidently why the guard workers would have a different opinion. You could be rated, as the term you have mentioned if you went out to solicit some of the nonguard workers and then you are prohibited from doing the guard workers. You can really be in kind of a catch-22 situation.

Maybe I am putting something in your statement that was not there.

Do you believe that armored car workers should be classified as guards?

Mr. CORDTZ. No.

Senator NICKLES. OK. I think maybe you have a legitimate point if a janitor or somebody else is being classified as a guard. I used to be a janitor and I did not make the wages you were talking about either.

Mr. CORDTZ. Not everybody does, Senator, but it was a comparison being made in a city the size of New York, that what is truly reflected in these people not being able to be represented by a union properly, what they are deprived of, and as you could hear in the testimony, there is $6 an hour differential in what people who are organized are being paid, with benefits on top of that, and those people making $4.18 an hour with no benefits.

Senator NICKLES. That is part of your job as an organizer and you have that right to do so.

Mr. CORDTZ. Certainly.

Senator NICKLES. I am trying to think of this definition of guard that we are looking at today, concerning an armored car driver. You do not think they should be classified as a guard?

Mr. CORDTZ. That is right.

Senator NICKLES. Does your union represent some of those people today?

Mr. CORDTZ. No, we do not.

Senator NICKLES. You are not in the same situation as the Teamsters where they have actually had representation and now find people moving away from the representation.

Mr. CORDTZ. Your specific question, Senator, as I understand it is do we represent any people who are armored car drivers.

Senator NICKLES. Yes.

Mr. CORDTZ. We do not.

Senator NICKLES. Have you lost any members directly that you could tell through 9(b)(3)?

Mr. CORDTZ. Sure. I gave one example of 110 people that we just recently lost in New York.

Senator NICKLES. Was that because of 9(b)(3) or did they decertify or what?

Mr. CORDTZ. Yes, because of 9(b)(3).

Senator NICKLES. Thank you.

Our next panelists are Sterling Smith, president of Stanley Smith Security, Inc. in San Antonio, representing the Committee of National Security Cos.; Herman Koehler, who is the owner of Coin Depot Corp. Mark Goldberg, counsel for Purolator Courier Corp. and William Cole, who is a consultant for Wells Fargo.

Gentlemen, welcome. Please proceed.

STATEMENT OF STERLING SMITH, PRESIDENT, STANLEY SMITH SECURITY, INC., AND CHAIRMAN, COMMITTEE OF NATIONAL SECURITY COS., INC.; HERMAN J. KOEHLER III, OWNER, COIN DEPOT CORP.; AVIEM GOLDBERG, COUNSEL, PUROLATOR COURIER CORP.; AND WILLIAM L. COLE, CONSULTANT, WELLS FARGO ARMORED SERVICE CORP

Mr. SMITH. Thank you, Senator. My name is Sterling Smith, and I am president of Stanley Smith Security, Inc. and I have 29 years of experience in the contract security industry. I am currently serving as chairman of the Committee of National Security Cos., or CONSCO, on whose behalf I am appearing today.

CONSCO's members are 16 of the major companies engaged in providing security services to virtually all types of enterprises, from manufactoring establishments transportation and communications facilities, from nuclear plants to warehouses. Collectively, we employ over 150,000 guards across the country.

CONSCO is very much concerned about S. 1018. This bill purports simply to clarify the original legislative intent of 9(b)(3) of the National Labor Relations Act. It would limit to only plant guards the prohibition against certification of bargaining units and bargaining representatives of both guard and nonguard employees.

Although this bill would not alter the definition of duties by which a guard or plant guard is identified, its limitation to only plant guards creates a huge potential for confusion at best. At worst, it virtually repeals section 9(b)(3). The bill provides no guidance on the question of how plant guards differ from a guard.

Decisions of the Board have historically ignored differences in the type of operations that employers conduct. Those decisions apply section 9(b)(3) protection against divided loyalty broadly as was intended to all employees whose functions are to enforce rules, to protect people and property, whether in an industrial facility, a hotel, or a hospital.

The provision has worked so effectively that we take it for granted, forgetting the problems it has kept from developing. The risk of reducing section 9(b)(3) scope and denying its protection to guards in office buildings, airports, banks, residential complexes, and other such nonplant facilities as S. 1018 threatens are obvious.

Guards who cooperate in collective actions by their union brethren deprive the employer of the protective services for which the guards were hired, just when the need for such services would probably be greatest. The potential for significant harm to people and property could easily be transformed into a frequent reality if a guard turned his back, for example, when the guard's union brethen became violent, as occurred recently in Minnesota. Imagine such a situation arising in a nonplant setting, a bank or a hotel, for example.

The danger of S. 1018 becomes quickly apparent. Few such nightmares have arisen under the broad protective cloak of section 9(b)(3). Without knowing from S. 1018 which guards might lose that coverage because they work at a facility that might not be a plant, prudence requires that at a minimum that the term "plant guard" be broadly defined. The term must apply clearly to all guards if security interests are to be preserved.

Potential for divided loyalty is even greater today than it was in 1947 when Congress enacted section 9(b)(3). For nearly 40 years, we have successfully avoided the problems that such dilemmas of divided loyalty would create. That success is the strongest reason to reject S. 1018.

We urge the members of this subcommittee to reject S. 1018. It is an unwarranted modification of a policy and a practice that works. It needs no change. Thank you.

[The prepared statements of Mr. Smith follows:]

STATEMENT

by

COMMITTEE OF NATIONAL SECURITY COMPANIES, INC.

on

S. 1018

Before The

SUBCOMMITTEE ON LABOR
Of The
UNITED STATES SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES

My name is Sterling Smith. I am president of Stanley Smith Security, Inc., and I am currently serving as chairman of the Committee of National Security Companies, Inc. (CONSCO), on whose behalf I am appearing today.

CONSCO is comprised of sixteen of the major companies engaged in providing security services to the nation's manufacturing establishments, transportation facilities, warehouse and storage facilities, nuclear facilities, retail establishments, sports and special events, and to virtually all other types of commercial enterprise. Our members collectively employ over 150,000 guards across the country.

The members of CONSCO are very much concerned about the effect of S. 1018. The bill purports to be a simple clarification of what its sponsors claim to have been the original legislative intent of Section 9(b)(3) of the National Labor Relations Act. In fact, restricting the definition of "guards", as it would, amounts to a denial of the reality of divided loyalty responsible for 9(b)(3)'s special legislative treatment of guards and their unionization. The bill would limit to only "plant guards" the prohibition against the National Labor Relations Board's certification of a union to represent a guard unit if the union also admits nonguard members. Similarly, only "plant guards" would be afforded the protection from divided loyalties that could arise, absent the prohibition against "mixed units" of guard and nonguard members.

Although this bill would not alter the definition of duties by which a "guard" (or a "plant guard") is designated, its limitation to "plant guards" only presents a huge potential for confusion, at best. The bill provides no guidance on the question of how a "plant guard" differs from a "guard." By the language of Section 9(b)(3), a "guard" (or a "plant guard" under the proposed revision) is an individual who "enforce(s) against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." Decisions of the Board have historically ignored differences in the type of operations employers conduct, applying Section 9(b)(3) to all employees whose functions are those of plant guards, with little concern for whether the workplace itself is an industrial facility, a hotel, or some other type of establishment.

"Barrier guards" at a skating rink, whose duty was protecting the employer's property from damage and theft and preventing unauthorized persons from entering the rink, were ruled to be "guards" for purposes of Section 9(b)(3) in Union News Company, 112 N.L.R.B. 584 (1955). Hotel security personnel were also found to be "guards" in Crumley Hotel, Inc., d/b/a Holiday Hotel, 134 N.L.R.B. 113 (1961). Their responsibilities included maintaining order on the premises and protecting hotel guests and property. More recently, hospital guards have been recognized as being within the scope of Section 9(b)(3), as well, since they performed the functions specified in that provision. Peninsula Hospital Center, 219 N.L.R.B. 139 (1975).

These cases illustrate clearly that "guards," who have been afforded the protection against divided loyalty of Section 9(b)(3), is a term that has been applied broadly, as was intended. Guards at hospitals, hotels, or warehouses are no less susceptible to division of their loyalties than are guards at a manufacturing facility, and the premises and lives they protect no less important. On its face, however, S. 1018 could exclude guards protecting such properties who may not fit within the general category of "plant guards," as that term is commonly understood by a lay person.

By way of examples, office buildings, airports, retail stores, banks and other financial institutions, residential complexes, and construction sites are not the types of sites that one thinks of in connection with the word "plant." Nevertheless, without defining the scope of "plant guards" more clearly, S. 1018 might readily permit guards assigned to work at any of these locations to be subjected to a division of loyalties between their job responsibilities to protect the premises and enforce rules on behalf of the employer and their allegiance to nonguard fellow union members at the same location. The risks of reducing Section 9(b)(3)'s scope to omit such guards from its protection are obvious. Guards who cooperate in collective actions by their union brethren deprive the employer of the protective services for which the guards were hired, just at a time when the need for such services may be greatest. Even if a guard continues working during such a period and under such conditions, the employer may be denied confidence in the protective services of guards who have access to valuable property and information, and who, in the worst imaginable scenario, are ideally placed to compromise (or even sabotage) the employer's interests in pursuit of the union's goals.

Few such nightmarish situations have arisen under the broad protective cloak of Section 9(b)(3). Not knowing which guards might be exposed to the removal of that coverage because the facility at which they work might not be a "plant," the more prudent approach requires, as a minimum, that the term "plant guard" be more specifically defined, if the scope of Section 9(b)(3) is too broad. We do not believe that to be the case, but excluding guards at facilities such as those described above from Section 9(b)(3)'s coverage would be contrary to the logic and need that gave rise to this provision of the Act that has withstood past attempts at modification, for the same good reason.

In Section 9(b)(3), Congress has recognized the unique nature of a security guard's work and the potential for conflicting interests that could stem from a guard's belonging to the same union as other employees at the guarded premises. A strike or other collective action could easily place a guard in a position of choosing between his or her allegiance to fellow union members, and duties to enforce rules and protect property for the employer. An employer must be able to rely on the undivided loyalty of those hired to maintain order and to protect the premises, trust to which Congress has recognized that an employer is entitled. An employer at a "plant," however defined, is not unique in this need.

The potential for divided loyalty continues to be as great today as it was in 1947 when Congress included Section 9(b)(3) as part of the National Labor Relations Act. Largely because Section 9(b)(3) does address the problem effectively, instances that demonstrate the dangers of "mixed unions" are few. One such example arose in 1980, however, after Wells Fargo recognized Local 807 of the International Brotherhood of Teamsters, nonguard union that the NLRB is prohibited from certifying, but that Wells Fargo voluntarily recognized. When employees set up picket lines around the money-handling room of a major New York bank during a union strike, the facility was effectively shut down because fellow Teamster guards from other armored car guard companies refused to cross the picket line, shirking their duties of ensuring the safe delivery of their cargo to demonstrate support for their union brethren at Wells Fargo. With the honoring of the picket lines, shipments to and from the bank and its customers were interrupted, disrupting operations of widely varied commercial customers. Still further disruption occurred after the striking Wells Fargo guards were replaced. Union members employed by competitor armored car companies refused to make pick-ups or deliveries at that location, severely interfering with delivery schedules there and even disturbing operations of the Federal Reserve System. Without the insurance of Section 9(b)(3), such chaos could arise with much greater frequency and could disrupt an even broader portion of the workplace as guards elected to join in collective actions by fellow union members in all other types of positions.

This is not an issue of the right of guards to organize. A number of guard unions, many of which enjoy considerable strength, have been organized and have grown over the years since the adoption of Section 9(b)(3). Additionally, guards working for a particular employer can also organize their own union, as has happened in many cases around the country. Guard employees have a number of options in choosing a bargaining representative, and prohibiting certification of nonguard unions has not interfered with the exercise of guards' rights to bargain collectively.

Certainly, the need for reliable security personnel--guards--who will perform their duties faithfully and responsibly mandates the insulation of guards from such conflicts of loyalty as a matter of public policy and necessity. The experience of nearly 40 years of successfully averting the problems that such dilemmas of divided loyalty would create, absent the protection of Section 9(b)(3), is a reality that is the strongest reason for rejecting efforts to amend this provision. CONSCO considers it essential that Section 9(b)(3) be continued in its present form in order to maintain the proper protection of clients' employees and property, particularly in an age when many local law enforcement agencies and fire departments have been severely reduced because of financial difficulties presently being encountered by many localities. Under such circumstances, it is vitally important not to detract from the effectiveness of private security personnel.

We urge the members of this Subcommittee to reject S. 1018 as an unnecessary and unwarranted modification of a Congressionally-endorsed policy and practice that has shown no need for change.

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May 8, 1986

The Honorable Don Nickles
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Suite 713
Hart Senate Office Building
Washington, DC 20510

Attention: Chuck Carroll

Dear Senator Nickles:

On behalf of the Committee of National Security Companies, I want to thank you for allowing me to testify at the April 24 hearing on S. 1018. Since the hearing, as I reflected on my own testimony and that of the other witnesses, there are three points that I want to clarify and re-emphasize about the problems peculiar to the security guard industry that both illustrate the reality of divided loyalty problems and underscore the need to continue Section 9(b)(3)'s protection without change.

The more dramatic illustration, of course, is that of a strike, the risks of which are obvious and undesirable. Whether faced with guards honoring the picket lines of their union brethren and not reporting for work, or with guards compromising the employer's security interests by allowing violations of the rules and jeopardizing lives and property, an employer's plight is unacceptably insecure. Even if guards in such a hostile situation remained loyal and continued performing their duties responsibly, the employer would still be left to wonder if or when those guards' trustworthiness would be subverted by union pressures. Add to such a volatile scenario the particularly ominous prospect of such pressures being orchestrated and directed by organized crime, as the testimony on this bill by Mark A. de Bernardo, speaking for the U. S. Chamber of Commerce, and by others before the Subcommittee on Labor indicates, and an employer's worst fears would be justified: the security for which he or she had contracted could be reduced to a mere illusion, quickly transformed into a disaster by guards able to provide confidential information that permits access to valuable property and data or endangers the lives of persons on the employer's premises.

A less dramatic but equally important and more common threat arises daily in the routine performance of a security guard's duties. By the express language of Section 9(b)(3), a guard's function is enforcement of rules to protect persons and property. The problem of divided loyalty that Section 9(b)(3) redresses is not limited to times of union-management unrest, but also could interfere with a guard's enforcement of the employer's rules when dealing with nonguard employees, who would be permitted by S. 1018 to include guards (except at "plants") in their bargaining units and in their unions. Such intermingling of guards and nonguards invites nonguard employees, especially those in union leadership positions, to thwart the employer's security measures.

The dilemma of a hospital guard who caught his shop steward, for instance, pilfering drugs, or even improperly present in a restricted area, is easy to grasp: to whom is his allegiance stronger, to the union and its representatives, or to his employer? Does he report the impropriety and risk disfavor with his union brethren and superiors, or turn his back and risk facing the consequences if the employer discovers his intentional "oversight"? The potential losses of an employer through day-to-day unauthorized removals of property (in basic terms, pilferage) represent a significant sum. An employer who even questions the loyalty of the guards enforcing the company's security rules is robbed of the peace of mind for which he is paying, without regard to any theft losses that the guards might be ignoring to accommodate union members who could be their brethren if S. 1018 were adopted. Limiting Section 9(b)(3)'s coverage to only "plant guards" and allowing guards to belong to the same bargaining units or unions as the employees with whom they share the workplace only fosters a greater sense of camaraderie between the guards and the employees against whom the guards are to enforce the employer's rules. Such an unhealthy situation is not in the best interest of the guards or of the employer.

Finally, as we noted in our testimony at the hearing on S. 1018 and in our earlier statement, problems of divided loyalty are not restricted to "plant guards" only. The thousands of security guards who protect lives and property at hospitals, airports, hotels, warehouses, special events from art exhibits to sporting events, office buildings, financial institutions and a vast array of other sites that are not commonly considered "plants" deserve--and must have--the same protection from the dilemma of conflicting interests of management and labor that this bill would continue to grant to "plant guards" only.

The principal focus of those testifying on this bill has been the issue of whether Section 9(b)(3)'s coverage should be withdrawn from armored car guards and couriers. We are concerned, however, that the bill's sponsor, Senator Gorton, has indicated in his testimony that the bill is also intended to remove Section 9(b)(3)'s protection from certain other security personnel, specifically, dressing room attendants, doorkeepers, hotel lobby attendants and hat check employees. Senator Gorton commented that such employees had been held to be "guards" in the NLRB's opinion "because they safeguard the property of the employer's customers," and concluded that they should not be treated as guards because as such, they "were denied the freedom to choose their bargaining representative." (Statement by Senator Slade Gorton before the Senate Subcommittee on Labor on S. 1018, pp. 2-3.) Deeming dressing room attendants and hat checkers mere "bailees," the bill's sponsor says that such employees were not the intended beneficiaries of Section 9(b)(3), and maintains that S. 1018 would simply clarify the limits of the class of beneficiaries.

One of the major strengths of Section 9(b)(3) is that it allows the NLRB the latitude to determine the extent to which specific employees' duties involve enforcement against employees of rules to protect the property of the employer and the safety of persons on the employer's premises. The responsibilities of security guards vary widely and depend on many factors, including the physical arrangement of the facility, the level of traffic and public access, the nature of the assets being protected, and, not least, the employer's wishes. In examining the duties and functions of specific gurads, the NLRB has found in some cases that employees assigned to dressing rooms or hat-check areas are "guards," while in other instances, similarly designated employees have been held not to be "guards," but merely clerical or monitorial workers whose protective responsibilities were strictly incidental to their checking functions. Excluding an employee from Section 9(b)(3)'s protection based solely on his job title or on his not being assigned to work at a "plant" (a term not defined in S. 1018, as we have noted earlier) could easily jeopardize security at a wide variety of facilities where divided loyalty poses every bit as great a threat as it does at "plants."

As the private security guard industry has grown, both in size and in technological sophistication, in the years since Section 9(b)(3) was enacted, so has the need for the protection that Section 9(b)(3) affords. The experience of forty years of not having to worry about whether a guard's loyalty is divided between his union allegiance and his employment responsibilities speaks for itself. This protection must be continued.

We thank you for affording us this opportunity to underscore the importance of retaining Section 9(b)(3)'s coverage, unimpaired by the confusion that S. 1018 would add to a sound, efficient and proven policy. Once again, we urge the members of the Subcommittee to reject S. 1018.

Sincerely yours,

Sterling S. Smith

Sterling S. Smith
Chairman

Senator NICKLES. Mr. Smith, thank you very much for your comments.

Mr. KOEHLER. My name is H.J. Koehler, and I am the owner and CEO of Coin Depot Corp., one of the largest independent armored car companies in the East, serving primarily the New York metropolitan area. I appreciate the opportunity to testify before the committee today on S. 1018, a bill that would seriously jeopardize the movement of coin and currency in the United States if enacted.

My purpose in testifying before the committee today is not to discuss the legal ramifications of this amendment but to try to give the committee my thoughts as an owner of an armored car company as to why S. 1018 is a dangerous bill and represents bad public policy.

Nearly everyone that has looked into this question, including this committee in 1978, has concluded that armored car guards are guards. The reason for this is basic common sense. These employees are responsible for transporting and protecting the economic lifeblood of our country.

While the armored car industry is tiny as a percentage of the gross national product, it is responsible for the movement of every physical dollar on a daily basis in the United States. In the New York City area, where my company operates, we haul coin, currency, food stamps, jewelry, furs, negotiable instruments and other highly valuable materials to and from the New York Federal Reserve, commercial banks, and other financial institutions and retail entities of various kinds.

A disruption in the flow of those items could cause economic paralysis and chaos as quickly as a cessation in the supply of electricity or food. The services of my company are retained because our customers expect their valuables to be transported safely from one point to another for same-day credit without interruption. We have done that for 27 years.

In performing our services, the employees of our company have been shot at, wounded, ambushed, robbed, hospitalized, and buried with increasing frequency. As their employer therefore, I cannot understand how anyone would make the statement that a person employed to transport valuables by armored car is not a guard.

Our people do not haul trucks full of disposable diapers or tomatoes, nor do people generally try to stick up trucks full of diapers or tomatoes. We haul money in large concentrations which attracts criminals. This Congress has spent the last several weeks debating whether the United States should give $100 million in aid to the Contras. Our company hauls two to five times more money than that daily. If Congress is concerned about whether $100 million would destabilize Central America, it should be equally concerned about the orderly flow of amounts of that kind that are hauled daily through the streets of this country by armored car.

Because armored car guards are guards, it is critically important that section 9(b)(3) continue to prohibit armored car guard unions from affiliating with international unions that contain nonguard members.

The Teamster constitution specifically provides that a member of the Teamster Union may be disciplined and fined whenever he crosses the picket line set up by any local affiliated with the IBT. I emphasize the word "any." Thus, if the Teamsters were to organize an armored car company, the employees would be faced constantly with divided loyalty situations. The employer could not expect employees to cross any picket line in order to make routine pickups and deliveries if that picket line had been set up by a Teamster local. When this occurs, the customers would have a choice between two undesirable alternatives, either leaving the money on the site until the labor dispute is settled or walking the money through the picket line by themselves. Neither alternative would serve the public interest, the protecting the flow of commerce.

Sponsors of S. 1018 readily concede that barring a unit of plant guards from affiliating with a union representing production and maintenance workers represents sound public policy. Why does this logic end with plant guards? If the sponsors are concerned with the conflict of loyalties that could arise between the plant guard and the production worker, why have they chosen to ignore the same split of allegiance that could erupt between an armored car guard and a production worker?

Section 9(b)(3) has worked well since its enactment nearly 40 years ago and in insulating guard employees, whatever type they are, from a situation in which conflicts could arise, they should remain untouched by this committee.

Finally, this committee and the sponsors of S. 1018 ought not to ignore the findings of the President's Crime Commission, findings that are consistent with my own observations. Before it acts further, this committee should review S. 1018 in light of those findings. I believe you owe it to the security of the Nation's financial system.

Thank you.

[The prepared statement of Mr. Koehler follows:]

COIN DEPOT
CORPORATION

STATEMENT OF

H. J. KOEHLER, III

ON S. 1018

BEFORE THE

SENATE SUBCOMMITTEE

ON

LABOR

April 24, 1986

1130 CHESTNUT STREET, P. O. BOX 514, ELIZABETH, NEW JERSEY 07207; 201-351-2636
CDC SYSTEMS WHEELS AND BANKING ELECTRONIC COIN HANDLING MODERN COIN CLEARING ARMORED CAR SERVICE COURIER SERVICES SPECIALIZED DEPOSIT PROGRAMS CUSTOMIZED SERVICE PLANS

My name is H.J. Koehler, III. I am the owner and C.E.O. of Coin Depot Corporation, one of the largest independent armored car companies in the East, serving primarily the New York metropolitan area. I appreciate the opportunity to testify before the Committee today on S. 1018, a bill that would seriously jeopardize the movement of coin and currency in the United States if it were enacted.

S. 1018 would amend section 9(b)(3) of the National Labor Relations Act -- the guard amendment -- to confine its application to plant guards and exclude all other types of guard employees, including armored car guards. The purpose of section 9(b)(3) as it is presently written is to insulate security employees from situations in which conflicts of loyalty could arise. These are situations in which guards would be forced to choose between their duty as guards to protect property in a strike situation, and their obligation as union members to lend assistance to their striking brethren.

Section 9(b)(3) permits armored car guards to form unions, bargain collectively and receive all other rights and protections guaranteed by the Act as long as three conditions are met. First, guards must be placed in separate bargaining units, apart from other employees. Second, a guard union cannot permit any employees who are not guards to join the union. Third, a guard union cannot affiliate with a union that admits non-guard employees into membership. S. 1018 would eliminate those three conditions for all guards except plant guards. There would be no limitation as to the types of employees who could be admitted as members of an armored car local, and the armored car local could affiliate with any international union that it chose even if it represented employees other than guards.

My purpose in testifying before the Committee today is not to discuss the legal ramifications of this amendment, but to try to give the Committee my thoughts, as an owner of an armored car company, as to why S. 1018 is a dangerous bill and represents bad public policy.

Congress enacted section 9(b)(3) in 1947 in reaction to a Supreme Court decision permitting guards to join the same union that represented the production and maintenance workers at a large steel mill. The Court found nothing in the NLRA, as it was written at that time, preventing production workers and guards who were responsible for the security of the facilities and equipment used by the production workers, from joining the same union. It was sufficient, the Court concluded, that the guards were placed in a separate bargaining unit. As a result, if there were a prolonged, violent strike at the steel mill, the Court found nothing wrong with having the employees responsible for guarding the mill in the same union as the employees striking the mill.

Congress correctly saw that the Supreme Court's reading of the law was fundamentally unsound. The purpose of the National Labor Relations Act is to provide a legal framework in which collective bargaining activities may be conducted while industrial strife is substantially minimized or avoided. It was obvious that industrial strife would not have been minimized by lumping guards together with all of a company's other employees. Within a few months of the Supreme Court decision, Congress enacted section 9(b)(3) to keep guard employees and guard unions separate from other types of employees and unions.

Section 9(b)(3) speaks in terms of "guards," and Congress left it to the National Labor Relations Board to decide which types of employees are to be considered guards. Beginning with the NLRB's 1953 decision in Armored Motor

Service Company, Inc., 106 N.L.R.B. 1139, it has been the law of the land that armored car guards are guards within the meaning of the Act. In that thirty-three year period, the dozens of Administrative Law Judges, members of the National Labor Relations Board, Federal Appellate Court judges, and Justices of the Supreme Court considering the question have almost uniformly held armored car guards to be guards.

The reason for this is basic common sense. These employees are responsible for transporting and protecting the economic lifeblood of our country. While the armored car industry is tiny as a percentage of the Gross National Product, it is responsible for the movement of every physical dollar, on a daily basis, in the United States. In the New York City area where my company operates, we haul coin, currency, food stamps, jewelry, furs, negotiable instruments, and other highly valuable materials. We transport paper currency and coin to and from the New York Federal Reserve, commercial banks and other financial institutions, and retail entities of various kinds. A disruption in the flow of those items could cause economic paralysis and chaos as quickly as a cessation in the supply of electricity or food. The services of my company are retained because my customers expect their valuables to be transported safely from one point to another for same day credit -- without interruption. We have done that for 27 years.

In performing our services, the employees of my company have been shot at, wounded, ambushed and robbed with increasing frequency. As their employer, therefore, I cannot understand how anyone would make the statement that a person employed to transport valuables by armored car is not a guard. Our guards do not haul trucks full of disposable diapers or tomatoes, nor do people generally try to steal trucks full of diapers or tomatoes. We haul money in large concentrations which attracts criminals. This Congress has spent the last several weeks debating whether the United States should give $100 million in aid to the Contras. My company hauls two to five times more money than that daily. If Congress is concerned about whether $100 million could destabilize Central America, it should be equally concerned about the orderly flow of amounts of that kind that are hauled daily through the streets of this country by armored car.

The drivers and custodians 1/ who work in armored cars are unquestionably guards. It is their responsibility to protect the materials being transported from damage and theft. Armored car guards are uniformed, armed, bonded, and subjected to strict security clearances. Armored car guards undergo rigid driver training to learn what to do when attacked. They are trained in the use of weapons and tested continually to insure that their proficiency is maintained. Most importantly, they are expected to use and do use that training to protect the materials that they transport.

Because armored car guards are guards, it is critically important that section 9(b)(3) continue to prohibit armored car guard unions from affiliating with international unions that contain nonguard members. It is my belief that the International Brotherhood of Teamsters is the primary force behind S. 1018. The Teamsters want to be able to represent armored car guards. Should this amendment be enacted, the security of the property that my company transports could be placed in serious jeopardy.

1/ See Appendix A for a description of the duties of armored car employees.

Article XIX, section 6(b) of the Teamster constitution spells out the bases on which disciplinary charges may be brought against members of the union. Subsection (7) provides that charges for which Teamster members shall stand trial and be punished include:

> crossing an authorized primary picket line established by the member's Local Union or any other subordinate body affiliated with the International Union [emphasis supplied].

In other words, a member of the Teamster union may be disciplined and fined whenever he crosses a picket line set up by any local affiliated with the IBT, and I emphasize the word "any." Thus, if the Teamsters were to organize an armored car company, the employees would be faced constantly with divided loyalty situtations. The employer could not expect his employees to cross any picket line in order to make routine pickups and deliveries if that picket line had been set up by a Teamster local. In the area in which my company operates, it has been my experience that the Teamsters typically do not cross any picket line no matter which union has authorized the picketing activity. When this occurs, the customers have a choice between two undesirable alternatives -- leaving the money on site until the labor dispute is settled or walking the money through the picket line by themselves. Neither alternative serves the public interest of protecting the free flow of commerce.

The question of divided loyalty, therefore, is not an abstract doctrine found only in legal treatises on this subject. It is something that armored car operators deal with each day on the streets.

The sponsors of S. 1018 readily concede that barring a union of plant guards from affiliating with a union representing production and maintenance workers represents sound public policy. Why does this logic end with plant guards? If the sponsors are concerned with a conflict of loyalties that could arise between a plant guard and a production worker, why have they chosen to ignore the same split of allegiance that could erupt between an armored car guard and a production worker?

There are also two major practical concerns that this Committee should not ignore in considering S. 1018. The first concern is one of union power and the public interest. Proponents of S. 1018 often say that section 9(b)(3) is flawed because it does not permit unions like the Teamsters, which have a reputation for being tough negotiators, to represent armored car guards. What this argument says is that because some guard unions have been unwilling to strike armored car companies for long periods of time, as the Teamsters would be willing to do 2/, section 9(b)(3) should be amended to permit NLRB certification of Teamster guard unions.

This argument is seriously flawed. In my opinion, elimination of the divided loyalty protections now provided by section 9(b)(3) is not justified because some guard unions understand the economics of small business operations and are reluctant to put a company such as ours out of business in order to establish high wage rates on paper. If my company were struck for more than a week, we would be forced out of business. Our fixed costs are such that without continuing revenues, we could not meet our financial obligations. Because Coin Depot is a small business, our employees are totally appreciative of this fact. It is also

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2/ In the spring of 1977, Teamster Local 820 engaged in a strike that lasted over two months. Among the employers whose guards participated in that strike were Brinks, Wells Fargo, and Purolator. Three years later, the Teamsters engaged in another strike directed at armored car companies in the New York area. Thus, the Teamsters -- who are the primary proponents of S. 1018 -- are willing to engage in the sorts of protracted strikes that can paralyze the entire armored car industry and force many armored car companies out of business altogether.

true of many of my competitors, with the exception of those owned by larger, publicly held companies.

An additional issue for this Committee to consider is whether it would be in the public interest for the movement of currency in a large metropolitan area to be brought to a standstill because of an area-wide strike by a labor union. If the Committee decides to approve S. 1018, I strongly suggest that you give serious consideration to a review of the national emergency dispute resolution provisions of the National Labor Relations Act. A determination would need to be made as to whether the law as it now stands would be adequate to deal with the financial crisis that would occur if, for example, all the employees of armored car companies were to go out on strike for a long period of time in the New York area, forcing the cessation of most currency transfers.

The other major practical concern that needs to be addressed is contained in the recently issued report of the President's Commission on Organized Crime, entitled The Edge: Organized Crime, Business, and Labor Unions. The Commission makes a series of findings which I assume have been brought to the attention of the members of this

Committee. I found the findings of the Commission to be totally consistent with my own observations during my 25 years of experience in the security business.

It is precisely because of the concerns raised by those findings that I have gone to great pains to assure that my employees are of the highest integrity and have no connections with criminal elements in our society. The success of my company is directly attributable to the integrity of my employees and our legal right to scrutinize them continually -- and divest ourselves of them if necessary to insure this integrity.

If the Teamsters were to organize my company, however, I would lose the ability to screen properly the people that I hire. Under their collective bargaining contracts, the Teamsters effectively dictate to companies who they are to hire, and they routinely challenge disciplinary actions. My friends who were members of Teamsters Local 820 in New York held for years that they worked for 820 and hardly recognized Brinks or Wells Fargo as their employer. In fact, under the Teamster Referral System that was a part of several collective bargaining contracts with armored car companies in New York, an employee of one company could be reassigned to one or two other companies during the course of a single workweek. An employer, in such a situation, cannot perform the screening necessary to insure the integrity of his employees.

As the Crime Commission Report details, there are many other insidious ways that organized crime working through a labor union can gain control of the assets of a business. In view of the findings of the Crime Commission, I respectfully request that this Committee ask itself whether it prudent to enact legislation giving the Teamsters the authority to organize the armored car industry in the United States. Does Congress consider it sound public policy for a union that the FBI has found frequently infiltrated by organized crime to be given the power to control the individuals reponsible for guarding and transporting the nation's valuables? The Crime Commission has recommended that Congress amend the National Labor Relations Act to make it an unfair labor practice for a labor organization to be managed by organized crime figures and for an employer to recognize or bargain collectively with a labor organization that is so dominated by organized crime. Serious consideration should be given to devoting more time to protecting the citizens of the United States from organized crime instead of taking actions that would potentially broaden its reach.

The President's Crime Commission calls on American business leaders to take a public stand that they will not intentionally deal with organized crime or aid or abet it in any way. I am willing to take that stand. I would hope that this Committee will support those that do.

Appendix A

Duties of Armored Car Employees

I. The Driver's responsibilities are:

(1) The safe handling and operation of the vehicle to which he is assigned.

(2) Opening and closing of all doors after he has deemed it to be safe.

(3) Observing the Guard and Custodian entering and exiting the customer's facility.

(4) Insuring that the delivery to the customer is correct and the deposit from the customer is for what the Custodian has signed.

(5) Alerting the Guard and Custodian of a possible dangerous situation by using horn, siren or the P.A. system.

(6) Protecting the contents of the vehicle at all costs and notifying the office immediately with all details.

II. The Custodian's responsibilities are:

(1) To be courteous toward the customer and the public at all times.

(2) To insure that he obtains a clear, legible signature for the delivery and receives exactly what he signs for from the customer.

(3) To insure that all deliveries and pick-ups are in sealed or locked containers as outlined in the procedures manual.

(4) To follow all pick-up procedures as outlined in the procedures manual; *i.e.*, that the safe is locked when leaving, doors are locked when making pick-ups, etc.

(5) To allow the Driver to check all outgoing and incoming shipments and record same on Driver's route sheet.

III. The Guard's responsibilities are:

(1) To exit the vehicle and position himself so that he can observe the entire area prior to the Custodian exiting the vehicle.

(2) Remain 20-30 paces behind the Custodian at all times and position himself in a manner to be able to protect the Custodian while making the customer delivery and pick-up.

(3) Have some knowledge of customer requirements and procedures.

Senator **Nickles**. Thank you very much, Mr. Koehler.

Mr. Maher, did you want to add a comment?

Mr. **Maher**. Yes, Senator. Thank you very much. I am vice president of First Fidelity Bank, Newark, NJ, and have served in that capacity since 1981. I was responsible for the development and operation of the bank's coin and currency center, the largest facility of its kind of any commercial bank in the United States. This is a 21,500 square-foot facility that is totally dedicated to cash processing and is totally dependent upon the independent movement of cash by armored carriers. Several hundred of our customers are serviced by that facility, including banks, retailers, wholesalers, supermarkets, airlines, groceries, hospitals, and gasoline stations. These business enterprises are totally dependent on monetary shipments for their continuous operations.

Prior to serving at First Fidelity Bank, I served at the Federal Reserve Bank of New York. I served a total of 16 years at the Federal Reserve Bank of New York, with more than 13 years of responsibility in the direction of cash movement.

It goes without saying that the private enterprise all over the Nation depends upon the effective and efficient operation of the Federal Reserve Bank and private banking institutions. The Federal Reserve Bank and private banking institutions, in turn, rely upon the uninterrupted operation of the armored carrier industry. I have no vested interest in the armored car industry. However, my extensive experience over the years has given me first-hand knowledge and I feel qualifies me to testify regarding the reliance of the private banking institutions such as First Fidelity Bank, upon the armored car industry.

Based on my experience, it is my belief that passage of S. 1018 would impose multiple dangers upon innocent members of the American business community by permitting outside unions to gain unfair leverage over the transportation of currency in this country. Since the National Labor Relations Act now provides that guards cannot be organized by a union that admits individuals who are not guards to membership, there is minimal risk that cash shipments will be impeded by a conflict of interest with another union at the delivery site.

I am personally familiar with the incidents that occurred during the 1980 strike by Teamster Local 821 against Wells Fargo in New York. Teamster drivers would not work within the premises of the Federal Reserve when permanent replacements for Wells Fargo were operating on that location. This interfered with the delivery schedules at the Reserve Bank since simultaneous deliveries of all carriers had taken place through the years.

Despite the fact that local 807's dispute was with Wells Fargo alone, the Federal Reserve and the institutions it serve became innocent victims in the dispute It would be an injustice to subject my institution and the rest of the Nation's business community to the serious adverse consequences that would result from passage of S. 1018.

Thank you very much, Senator, for the opportunity to express my views.

Senator **Nickles**. Thank you very much for your comments.

Mr. **Goldberg**. Mr. Chairman, my name is Avrum M. Goldberg. Over the past several years I have served as counsel to Purolator Courier on a variety of labor matters, including those involving section 9(b)(3) of the National Labor Relations Act. I am pleased to be here today to present Purolator Courier's views on that subject. Unfortunately, neither Howard Hardesty, the president and chief executive officer of Purolator, nor Armando Labrada, vice president and associate general counsel, could be present today due to Purolator's annual shareholders meeting. They requested that I convey their thanks to the chairman and members of the subcommittee for inviting Purolator Courier to participate in this vital hearing.

Purolator operates one of the largest time-sensitive, security oriented express delivery services for the transportation of valuables in North America. We operate a fleet of over 6,000 ground vehicles, close to 100 aircraft, maintain more than 290 terminal and office locations, and employ over 16,000 people.

To understand why Purolator's courier guards are guards within the meaning of section 9(b)(3), I think it is important that the subcommittee know something of the history and development of Purolator. The evolution of our business from an armored car operation to a specialized courier service makes it unique among courier companies and especially qualified to fit within section 9(b)(3)'s guard exclusion.

Purolator's roots trace back to Cross Armored Corp. which primarily transported cash and cash letters from banks to the Federal Reserve. However, as commercial businesses came to realize the advantages of moving time-sensitive documents and materials by courier guards, Cross Armored began to tailor its services to these demands and offered overnight services for the transport of highly valuable items such as cash letters, negotiable instruments, legal documents and payroll checks. Today, Purolator's service remains much the same.

Our 10,000 courier guards are trained as guards, bonded, wear uniforms and must pass a security clearance. Their duties include making pickups and deliveries during nonworking hours, carrying locked pouches for the transportation of valuables and protecting customers' property at all times. Courier guards carry keys that allow after hours access to customers' locked premises and security vaults and they turnoff-and-on burglar alarms upon entering and leaving the customers' premises.

As you can see, the foundation upon which Purolator's business was built has led to the development of a unique service which can be distinguished from that of other overnight couriers. For this reason, the NLRB has consistently found Purolator's courier guards to be guards under section 9(b)(3).

It might help if I provided you with a little background on these cases and how guard determinations are made. The NLRB focuses on whether the employees protect property and whether representation by nonguard unions would potentially place employees in the situation where they would be forced to choose between their job responsibilities and their allegiance to fellow union members.

In each of the *Purolator Courier* cases, the NLRB and the Federal courts embarked on a highly detailed review of the courier's duties to determine whether our employees were actually functioning as guards. The Board emphasized several key facts. Some of these facts are that the courier guards make pickups and deliveries during nonworking hours and have access to locked security vaults by entry into the client's locked premises, and that for each delivery run which requires entry into customers' locked premises the dispatcher furnishes the courier guards on that run with all the keys needed for entry into the customer's premises for disengaging burglar alarm systems and for entering the customer's security vault.

Based on these findings, the Board has held in three separate cases that Purolator's courier guards are guards within the meaning of section 9(b)(3).

To sum up, after an exhaustive review of briefs, evidence, documents, and testimony on a case-by-case basis, administrative law judges and the NLRB composed of members appointed by both Democratic and Republican Presidents and Federal courts have found Purolator's couriers to be guards under section 9(b)(3).

The subcommittee should understand, however, that those couriers who do not perform the guard-like duties similar to those described above will not be accorded section 9(b)(3) coverage. Furthermore, to the extent such duties change, the NLRB may revoke guard status if it is no longer justified.

Mr. Chairman, it is the fundamental concept of divided loyalty that should guide the subcommittee's action with respect to S. 1018, for it goes to the very heart of this controversy. Employers should not be forced to question the loyalty of their guard employees.

For example, where one of our customers is faced with a prolonged and violent labor strike, a courier guard entering that company after hours with his own set of keys can indeed be faced with a conflict, and what assurance would we have that the guard will not capitulate to the demands of his brothers perhaps by leaving a door open a crack. While we believe our guards to be the best and most trustworthy in the industry, it would be unfair to subject them to the pressures that understandably would be brought to bear should S. 1018 be enacted.

There is no question that the potential for divided loyalty exists whenever a Purolator Courier guard enters a customer's premises to make a delivery. This was true in the past and it is still true today. Our courier guards continue to perform those functions that make them section 9(b)(3) guards. Reversal of this well-considered and well-developed law would serve no useful purpose and indeed would only frustrate Congress' original goal.

Thank you.

[The prepared statement of Armando Labrada follows:]

STATEMENT OF ARMANDO LABRADA
VICE-PRESIDENT & ASSOCIATE GENERAL
COUNSEL,
PUROLATOR COURIER CORP.

HEARING ON S. 1018
BEFORE THE SUBCOMMITTEE ON LABOR
OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

April 24, 1986

I. INTRODUCTION

Mr. Chairman and Members of the Subcommittee, my name is Armando Labrada and I am Vice-President and Associate General Counsel of Purolator Courier Corp., based in Basking Ridge, New Jersey. Over the past eleven years, I have worked for Purolator Courier on a variety of labor matters including those involving Section 9(b)(3) of the National Labor Relations Act. I am pleased to be here today to present Purolator Courier's views on that subject. The President and Chief Executive Officer of Purolator, Howard Hardesty, requested that I convey his thanks to the Chairman and Members of the Subcommittee for inviting Purolator Courier to participate in this vital hearing.

Purolator Courier Corp., through its U.S. Courier Division in the United States and its Canadian subsidiary, Purolator Courier Ltd., operates one of the largest small package express delivery services in North America. To ensure prompt delivery, Purolator Courier operates a fleet of over 6,000 ground vehicles and close to 100 aircraft, maintains more than 290 terminal and office locations, and employs over 16,000 people. This sophisticated air and ground transportation system, with air hubs located in Indianapolis Indiana and Toronto, Ontario supports the time-sensitive delivery of packages to 75,000 destinations in over 150 countries throughout the world.

II. HISTORY AND DEVELOPMENT OF PUROLATOR COURIER CORP.

To understand why Purolator's Courier Guards are guards within the meaning of Section 9(b)(3), I think it is important that the Subcommittee know something of the history and development of Purolator Courier. The evolution of Purolator Courier's business from an armored car operation to a specialized courier service makes it unique among courier companies and especially qualified to fit within Section 9(b)(3)'s guard exclusion.

In 1967, Purolator acquired American Courier Corporation, previously known as Cross Armored Corporation. Cross Armored was started in 1947 as a one-vehicle armored car company operating in Bayside, New York. During its first years, Cross Armored primarily transported cash letters from banks to the Federal Reserve. However, as other commercial businesses came to realize the advantages of moving time-sensitive documents and materials by entrusting them for delivery to Courier Guards, Cross Armored began to tailor its services to these demands. Hospitals, for example, were among the first nonbanking interests that sought courier transportation services because human lives could be saved by the prompt and safe delivery of human blood, human organs, radioactive pharmaceuticals or controlled drugs.

As the years progressed, more businesses came to rely on Cross Armored to meet their critical delivery needs, which included the transport of highly valuable items such as cash, negotiable instruments, jewelry, furs, confidential trade secret documents, artwork, seismological data for oil companies, emergency replacement parts for manufacturing equipment, legal documents and payroll checks. In 1952, to reflect the changing character of its business, Cross Armored became American Courier Corporation.

American Courier Corporation grew rapidly as demand for its services increased. Today, American Courier is Purolator Courier Corp. which continues to provide businesses with the safe, prompt delivery of the same wide variety of critical, time-sensitive materials.

To ensure safety in the tradition of its armored car predecessor, Purolator Courier employs approximately 10,000 Courier Guards who are trained as guards, bonded, wear uniforms, and must pass a security clearance. Their duties include making pick-ups and deliveries during nonworking hours, carrying locked pouches for transportation of valuables, and protecting customer property at all times.

To perform these services, Courier Guards carry keys that allow after-hours access to customers' locked premises and security vaults. Courier guards are required to report anything unusual that might be observed during these after-hours calls. Moreover, if they find a building unlocked or otherwise unsecured, they are trained to notify the proper authorities and remain on the premises until their arrival.

Thus, the foundation upon which Purolator's business was built has led to the development of a unique service which can be distinguished from that of other "overnight" couriers. The growth of this business enables Purolator to provide its clients with a special kind of service -- the transport of time-sensitive materials by trained security personnel. The sense of confidence that our clients have in this service would be undermined if section 9(b)(3) were to be repealed.

To date, when our Courier Guards have encountered a picket line. only concerns for safety have delayed deliveries. However, S. 1018 will change this. A mixed guard/nonguard union will require that courier guards not make deliveries if they entail crossing picket lines set up by their own union. As a result, the potential conflict of loyalties that Congress sought to avoid in 1947 will be realized.

As the employees of many of Purolator Courier's customers are represented by nonguard unions, imagine, if you will, a Courier Guard assigned to deliver necessary pharmaceuticals to a hospital being faced with a picket line of his own union at that hospital. If the Courier Guard crosses the picket line, he will be fined, expelled from the union, and scorned by fellow workers. If he refuses to cross the picket line, the patients suffer. Another even more common scenario, would involve a situation where one of our customers is faced with a prolonged and violent labor strike. A courier guard entering that company after hours with his own set of keys would indeed be faced with a conflict -- and what assurances could we give our customer that the guard will not capitulate to the demands of his brothers, perhaps by leaving the door open a crack. Of course, we believe our guards to be the best and most trustworthy in the industry, however, it would be unfair to subject them to the pressures that will understandably be brought to bear should S. 1018 be enacted. These, Mr. Chairman, are the conflicts of loyalty that Purolator's Courier Guards have not had to face because Section 9(b)(3) is a well-developed, workable law.

III. LEGISLATIVE HISTORY OF SECTION 9(b)(3)

S. 1018 seeks to amend Section 9(b)(3) by restricting its scope to "plant guards," thereby eliminating coverage of employees like armored car drivers and courier guards who protect valuable property in transit. The bill's proponents have characterized the change as a "technical amendment" to reflect the original intent of Congress, claiming that Section 9(b)(3) was intended to cover only stationary, as opposed to mobile, guards. Contrary to this contention, the legislative history of Section 9(b)(3) plainly establishes that Congress never intended to distinguish between stationary and mobile guards when it enacted the provision.

Congress enacted Section 9(b)(3) in response to the Supreme Court's decision in NLRB v. Jones & Laughlin Steel Corp., 331

U.S. 416 (1947). That case involved review of an NLRB order requiring the employer to bargain with the Steelworkers' Union as the collective bargaining representative of the company's guards. The union also represented the company's production employees in a different unit. The Sixth Circuit Court of Appeals denied enforcement of the Board's order, holding that it was improper for the Board to certify a union as the representative for a unit of guards because the union also represented the employer's production workers. NLRB v. Jones & Laughlin Steel Corp., 154 F.2d 932 (6th Cir. 1946). The court reasoned that the guards

> have a private obligation to their employer . . . . In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards . . . would be incompatible with their obligations to the Union which, since it represents production employees, authorizes and directs the strike.

Id. at 935.

In a 5-4 decision, the Supreme Court reversed and ordered enforcement of the Board's order. However, during the time the Supreme Court was reviewing Jones & Laughlin, Congress was considering the status of guards under the NLRA and the Board's policy of permitting guards collective bargaining representation. The House of Representatives proposed classifying guards as supervisors, thereby denying them protection under the Act altogether.[1] H.R. 3020, 80th Cong., 1st Sess. § 2(12)(B) (April

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[1] Under the NLRA, supervisors are expressly excluded from the definition of employees protected by the Act. See 29 U.S.C. § 152(3).

16, 1947). The Senate disagreed with the House view, however, and insisted upon preserving the employee status of guards. H.R. 3020, *as amended*, 80th Cong., 1st Sess. § 2(a) (May 13, 1947).

In reconciling these two conflicting views of the bargaining rights of guards, the House-Senate Conference Committee adopted Section 9(b)(3). H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 47-48 (June 3, 1947). Although the committee wanted guards to retain their rights as "employees" under the Act, conferees on both sides were "impressed with the reasoning of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case." 93 Cong. Rec. 6601 (June 3, 1947) (Statement of Sen. Taft). Therefore, in the words of Senator Taft, "we provided that [guards] could have the protection of the Wagner Act *only if they had a union separate and apart from the union of general employees*." *Id.* at 6603 (emphasis added).

Senator Taft's statements demonstrate that Congress' purpose in enacting Section 9(b)(3) was to insulate employers of guards from the potential conflict of loyalties described by the Sixth Circuit in *Jones & Laughlin*. Congress determined that these conflicts necessarily result when guards are members of a mixed unit or are represented by a union that also represents non-guards. As a result, "Congress drafted [Section 9(b)(3)] to minimize the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer against a fellow union member." *Drivers, Chauffeurs, Warehousemen and*

Helpers, Local No. 71 v. N.L.R.B., 553 F.2d 1368, 1373 (D.C. Cir. 1977).

The references to "plant guards" in the legislative history of Section 9(b)(3) reflect Congress' concern with the particular facts of the Jones & Laughlin case. These references, however, do not indicate that Congress intended to limit the exclusion only to plant guards. Indeed, the legislative history contains a number of references to Section 9(b)(3) where the term "guards" is not limited to the plant setting. See, e.g., H. Rep. No. 510, 80th Cong., 1st Sess. 35-36 (1947), reprinted in 1947 U.S. Code Cong. Service 1135. As envisioned by the Conference Committee, for example, Section 9(b)(3)

> provides that the Board cannot decide that any unit is appropriate for collective bargaining if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property belonging to the employer or for which the employer is responsible, or to protect the safety of persons on the employer's premises.

H. Rep. No. 510, 80th Cong., 1st Sess. 48, reprinted in 1947 U.S. Code Cong. Service 1153-54 (emphasis added). Thus, as the District of Columbia Circuit Court of Appeals emphasized in construing Section 9(b)(3)'s legislative history,

> [t]he numerous references to "plant guards" in the Act's legislative history indicate only that in drafting Section 9(b)(3), Congress "may have had plant guards primarily in mind." Nothing in that history evinces an intent to limit the application of Section 9(b)(3) to plant guards. Presumably, so fundamental a restriction would have found

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> expression in the statutory language of the provision.

Drivers, Chauffeurs, Warehousemen and Helpers, Local No. 71 v. N.L.R.B., 553 F.2d at 1372-73.

IV. APPLICATION OF SECTION 9(b)(3) TO COURIER GUARDS

Since the enactment of Section 9(b)(3), the NLRB and the federal courts have developed a substantial body of case law in determining whether particular groups of employees are guards within the statute's intended meaning. These cases have identified a limited number of employees as guards under Section 9(b)(3) by focusing on whether the employees' responsibilities primarily involve protecting property, and whether representation by a nonguard union would potentially place the employees in a situation where they would be forced to choose between their job responsibilities and their allegiance to fellow union members. Thus, mindful of Congress' original desire to prevent such conflicts, the NLRB and the courts have held that employees such as courier guards responsible for transporting and protecting customers' property are guards under Section 9(b)(3).

The NLRB established that 9(b)(3)'s scope was not limited to stationary guards over thirty years ago in Armored Motor Service Co., 106 N.L.R.B. 1139 (1953), when it concluded that Congress intended that armored car guards should be included within the statute's coverage. In doing so, the Board focused on the "divided loyalty" test -- Congress' principal concern in enacting

Section 9(b)(3) -- and concluded that it makes no difference whether a guard is stationary and protecting his employer's property or if he is mobile and protecting property of the employer's customer. In either case, an important public policy is served by prohibiting a nonguard union from becoming the certified collective bargaining representative of the guard employees.

Since Armored Motor Service was decided, the Board has consistently held that employees such as courier guards, who are engaged in transporting and protecting valuable and time-sensitive property, are also guards within the meaning of Section 9(b)(3). In the first of such cases, Brinks, Inc., 226 N.L.R.B. 1182, 1183 (1976), the Board held that only couriers "engaged in protecting property" are covered by Section 9(b)(3). The couriers at issue transported, in unarmed vans, nonnegotiable items such as cancelled checks and correspondence between banks. The Board rejected the argument that the couriers were not guards because the property they transported was nonnegotiable, finding the couriers to be guards since they were "entrusted with locked bags or pouches containing the customer's valuable property for their safe and timely delivery to designated destinations." Id. The Board also noted that the couriers were bonded and emphasized the time-sensitive nature of the property transported by the couriers.

The Brinks test has been invoked in each subsequent courier case. See MDS Courier Service, Inc., 248 N.L.R.B. 1320 (1980); Purolator Courier Corp., 254 N.L.R.B. 599, No. 72 (1981) ("Purolator I"); Purolator Courier Corp., 265 N.L.R.B. 659, No. 86 (1982) ("Purolator II"); Purolator Courier Corp., 266 N.L.R.B. 384, No. 74 (1983) ("Purolator III"); Teamsters Local 851 v. N.L.R.B., 732 F.2d 43 (2d Cir. 1984). In each of these cases the NLRB and the federal courts have embarked on a highly detailed review of the couriers' duties in an effort to determine whether these employees were actually functioning as guards within the meaning of Section 9(b)(3). As the Board stated in Purolator I:

> All of the courier/guards are bonded and must pass a security clearance before being hired . . . . They wear uniforms, supplied by the Employer, consisting of shirt, trousers, jacket, cap or hat, with an identifying company logo. The Employer issues the uniforms to make its employees readily identifiable to clients and local law enforcement agencies. The courier/guards make deliveries in vans owned by the Employer, which are clearly identified . . . . For a substantial number of the Employer's clients, the courier/guards make pickups and deliveries during nonworking hours, and have access to clients' locked security vaults by entry into the clients' locked premises. For each delivery run which requires entry into customers' locked premises, the dispatcher furnishes the courier/guards on that run with all the keys needed for entry into the customers' premises, for disengaging any alarm systems, and for entering the customers' security vaults. The keys are distributed at the beginning of the shift, and the courier/guard returns the set of keys after he has completed his rounds. The courier/guards are held accountable for the safekeeping of

> packages in their vehicles as well as for taking precautions when entering or leaving customers' premises during nonworking hours.

254 N.L.R.B. at 599-601. Moreover, as the Board noted in Purolator III, courier/guards may be required to "provide the secure, timely transportation of a wide variety of valuable commodities ranging from cash letters to controlled drugs and radioactive pharmaceuticals." 266 N.L.R.B. at 384-85. Detention or destruction of such materials could, quite literally, be a matter of life or death.

Although the Board and courts have found certain couriers to be guards within the meaning of the Act, decisions applying Section 9(b)(3) have adhered to the initial limited conception of the provision: **neither the Board nor the courts have hesitated to deny employees in certain positions the status of "guard" under the NLRA.** See, e.g., Wells Fargo Alarm Services v. NLRB, supra (alarm servicemen and installers); Deluxe General, Inc., 241 N.L.R.B. 229 (1979) (whistlemen and flagmen); Lion Country Safari, 225 N.L.R.B. 969 (1976) (gatemen); United States Gypsum Co., 152 N.L.R.B. 624, 627 (1965) (heating equipment operators); Spink Arms Hotel Corp., 133 N.L.R.B. 1694, 1696 (1961) (elevator operator, mail clerk, houseman); Cities Service Oil Co., 145 N.L.R.B. 467 (1963) (safety inspectors); Republic Aviation Corp., 106 N.L.R.B 91 (1953) (telephone operator).

The limited number of decisions that have found certain couriers to be guards are justified on a case-by-case basis to ensure adherence to Congress' original legislative intent. In each case, the NLRB has engaged in an exhaustive analysis to determine whether the couriers are truly guards. Thus, couriers who do not perform the guard-like duties similar to those described above are not accorded Section 9(b)(3) coverage. Furthermore, to the extent such duties change, the NLRB may revoke guard status if it is no longer justified. As a result, the policy concerns that prompted enactment of Section 9(b)(3) are very much applicable to those couriers who have been found to be guards under the Act.

V. S. 1018: AN UNNECESSARY REVERSAL OF MORE THAN THIRTY YEARS OF WELL-DEVELOPED LAW

S. 1018 seeks to reverse more than thirty years of well-developed case law by limiting coverage of Section 9(b)(3) to "plant guards." S. 1018's proponents, in seeking to reverse this case law, have argued that the Board's "guard" decisions have denied certain employees collective bargaining representation and that courier guards are no different from truck drivers or postal employees who are not considered "guards". These contentions are without merit.

The NLRB's interpretation of Section 9(b)(3) has not denied collective bargaining representation to courier guards. Guard employees can and do join guard unions. Indeed, there are several prominent unions of this type, such as the United Plant Guard Workers of America, with close to 30,000 members, and the

International Guards Union of America. Congress and the NLRB have not prevented guards from obtaining representation; rather, they simply have determined that the important public policy of preventing the potential for divided loyalty requires that employers of guards cannot be forced to recognize unions which also represent nonguards.

Indeed, for similar policy reasons, Congress has denied NLRA rights to other types of employees. For example, the 1947 Taft-Hartley amendments totally excluded supervisors from coverage by the Act because of the employer's need for a loyal supervisory force. See 29 U.S.C. §§ 152(3), 164(a). As a result, the Board lacks authority either to include supervisors in bargaining units with other employees or to establish units comprised solely of supervisors. The policy behind the guard exclusion -- avoiding the potential for divided loyalty among an employer's guard employees -- is quite similar to the supervisory exclusion. Yet, Congress decided to give guards much greater rights under the Act. In contrast to supervisors, who have been completely denied NLRA protection, the guard exclusion limits only the Board's ability to certify nonguard unions as the representative of guard employees. In all other respects, guards, unlike supervisors, enjoy full protection under the Act.

Also inaccurate are the analogies made by the bill's proponents. For example, it has been postulated that courier guards are really no different from truck drivers safeguarding cargo, or from U.S. Postal Service employees protecting and delivering the mail. See 131 Cong. Rec. S4888 (daily ed. April 26, 1985) (statement of Sen. Gorton). Although similarities among courier guards, truck drivers and postal carriers can be drawn, the distinctions, for purposes of determining Section 9(b)(3) status, are clear. Nevertheless, because these points have been raised, I will address them.

First, truck deliveries do not demand the same attention to security required of Courier Guards. Truck deliveries occur during the course of the business day and do not require that the truck driver have access to customer premises during nonworking hours. In only the rarest case would a truck driver be entrusted with keys to enter customer premises after-hours or to perform the host of security-related duties that couriers do.

Second, regular truck deliveries are rarely urgent in nature. While truck shipments may involve the delivery of valuable or prized items, critical losses do not occur if a shipment is delayed by one or two days. Often, truck deliveries are expected within a range of days and not within a matter of minutes or hours. Courier deliveries, on the other hand, involve highly valuable, time-sensitive materials. A bonded courier whose deliveries are too often late, even if only by a few hours, may be fatally tarnished with a bad reputation -- and with good reason. The late delivery of blood plasma, serum, or human organs could cost human lives. The untimely delivery of emergency replacement parts for computers or manufacturing equipment could cause the shutdown of plants and factories. The delayed delivery of a legal document might result in the loss of a million dollar investment or in a forfeiture of essential legal rights.

Like guards, the rights of Postal Service employees are also restricted in a manner that prevents instances of divided loyalty. To ensure delivery of mail, postal workers are prohibited from engaging in strikes. See 39 U.S.C. § 410(b) (1982 & Supp. 1985). Even if postal employees were granted full rights under the NLRA, their duties do not entail the same degree of security orientation required of courier guards. Postal workers deliver exclusively during business hours and the items they carry are generally not as valuable or as time-sensitive as those transported by courier guards.

VI. CONCLUSION

Mr. Chairman, there is no question that Congress originally intended the guard exclusion to apply to mobile guards who perform the type of security-related services that Purolator Courier Corp. offers. I am here today to tell you that the reasons for Congress' original enactment of Section 9(b)(3) as applied to mobile guards are very much in existence today.

It is the fundamental concept of divided loyalty that should guide the Subcommittee's action with respect to S. 1018, for it goes to the very heart of this controversy. While nobody would suggest that the status of supervisors should be changed, that same clear rationale as applied to guards is being questioned. Employers should not be forced to question the loyalty of their guard employees or their supervisors.

All the decisions of the NLRB relating to Purolator's couriers have held them to be guards. On numerous occasions, after an exhaustive review of briefs, evidence, documents, and testimony on a case-by-case basis, administrative law judges, an NLRB composed of members appointed by both Democratic and Republican Presidents, and the federal courts have found Purolator's Couriers to be guards under Section 9(b)(3). Moreover, in no case have Purolator's Courier Guards been deemed not to meet the requirements for guard status. Neither has there ever been a Board decision regarding Purolator's couriers that has prompted even so much as a dissent from any Board member. This consistent line of decisions has meant that the potential tragedy of pharmaceuticals not delivered to the hospital as hypothesized earlier cannot occur.

Thus, the Board and the courts have repeatedly found that potential for divided loyalty exists whenever a Purolator Courier guard enters a customer's premises to make a delivery. As such, reversal of this well-considered and well-developed law would serve no useful purpose, and indeed would only frustrate Congress' original goal.

Senator **NICKLES**. Mr. Goldberg, thank you very much.

Mr. **COLE**. Thank you, Senator Nickles. My name is William L. Cole. I am sole owner of Risk Survey Services, a company which, among other things, performs risk surveys for insurance underwriters providing all-risk insurance coverage for armored car companies.

I am also a consultant to and was formerly a senior officer of Wells Fargo Armored Service Corp., and I am authorized to present this statement on their behalf here today.

The 1953 ruling of the National Labor Relations Board that first held armored car guards to be guards within the meaning of the act, and that consistently has been followed since then, was as previously mentioned the decision in *Armored Motor Service, Inc.*

I was one of the two witnesses in that case, and I can say that the reasons for including armored car guards within the coverage of 9(b)(3) are as valid today, if not more valid than they were 33 years ago when I testified in 1953. I was just a baby.

My previous appearance before this committee came 8 years ago during the Senate consideration of the Labor Reform Act. The House had already approved that, including provisions similar to those contained in S. 1018, to limit section 9(b)(3)'s coverage to plant guards. This committee saw the danger of such a limitation and approved by an overwhelming 11 to 3 vote an amendment offered by Senator Riegle to replace the House changes. The Riegle amendment was aimed at insuring that armored car guards, courier guards, and guards working for contract security services would remain within section 9(b)(3)'s coverage. By refusing in 1978 to adopt the House approved reduction in section 9(b)(3)'s coverage, the members of this committee demonstrated a clear understanding of the realities that confront armored car and other nonplant guards in the American workplace.

I urge this committee to reject S. 1018 and to show the same wisdom today which it demonstrated in 1978. Webster's defines a guard as one who "protects from harm, defends." According to that or any other definition, armored car crewmen are guards. Moreover, the duties of armored car guards expose them to the same threat of divided loyalty that confronts typical plant guards. Indeed, that threat may be greater for armored car employees. These simple facts are made clear by a look at the dangers that threaten our employees daily as they perform their duties.

Members of this committee—and you, I am sure, Senator Nickles, undoubtedly have read the recent press accounts of the gunfight in Miami that left two FBI agents dead and several others wounded. The criminals who the FBI were pursuing were members of the Marielito gang that has victimized the armored car industry in south Florida since 1982. That gang is considered to be responsible for at least 15 robberies of armored trucks. Last June, they attacked one of Wells Fargo's employees, shot him fatally through the chest and stole $40,000. The Marielitos, who use paramilitary tactics in carrying out their robberies, and are well armed with M-16 automatic rifles, shotguns, grenades, and other explosives.

Violent attacks, unfortunately, have become a fact of life in the armored car industry. In 1985, there were 22 attacks on Wells Fargo operations alone. The most well-publicized incident occurred in New York when four individuals linked to the Mafia burrowed into one of our terminals and overwhelmed four guards, escaping with nearly $8 million in currency.

Incidents far more common, however, have involved attacks on our guards who are making routine deliveries and pickups. Of the 22 incidents that occurred during 1985, 14 involved the use of handguns, shotguns, or other weapons to kill or injure our armored car guards.

I invite Senator Gorton, and I am sorry he is not here, and all other supporters of S. 1018 to accompany one of our armored cars on a typical run through the streets and see for themselves whether our employees are guards.

We train our guards to expect a robbery at any time. As the sad statistics illustrate, our armored car guards risk their lives on a daily basis to perform their duties. I respectfully submit that any employee who faces the threat of crime that Wells Fargo's armored car crewmen face each day and any employee who must perform the duties and procedures that we require of our crewmen understandably is a guard.

The proponents of S. 1018 who say that an armored car guard is nothing more than a "truckdriver with a gun" is grossly mistaken. Armored car employees operate in a totally different manner than common carrier truck delivery personnel. They are not only responsible for transporting extremely valuable cargo, but are also required to protect those cargo from any attack. That is why contract armored car companies like Wells Fargo are not common carriers, are retained to transport currency and other valuables.

Finally, I would like to say very respectfully in all sincerity, and based on my over 35 years' experience in the armored car security industry, which includes 33 years with the issue we discuss here today, that anyone in the Congress or out of the Congress—and that would include Harvard professors—who have the impression that armored car crewmen are not guards in every sense of the term simply either have not seriously examined their opinion or is blind to the day-to-day operations and the dangers inherent in the armored car service industry.

Fortunately, the armored car service industry, its customers, the National Labor Relations Board, the courts, and to date the Congress are fully knowledgeable on the subject and have reacted accordingly. We trust these remarks as well as our detailed prepared statement will be made a part of the record and we very much appreciate the opportunity to be here.

Thank you.

[The prepared statement of Mr. Cole follows:]

STATEMENT OF
WILLIAM L. COLE
ON BEHALF OF
WELLS FARGO ARMORED SERVICE CORPORATION

BEFORE THE
EMPLOYMENT OPPORTUNITIES SUBCOMMITTEE
OF THE
COMMITTEE ON EDUCATION AND LABOR
OF THE U.S. HOUSE OF REPRESENTATIVES

ON

AMENDMENTS OF SECTION 9(b)(3)
OF THE
NATIONAL LABOR RELATIONS ACT

April 24, 1986

STATEMENT

My name is William L. Cole. I am sole owner of Risk Survey Services, a company which, among other things, performs risk surveys for insurance underwriters providing all risk cargo insurance coverage for armored car service companies. I am also a consultant to and was formerly a senior officer of Wells Fargo Armored Service Corporation, and I am authorized to present this statement on behalf of Wells Fargo this morning.

From my experience as both an executive of a major armored car company and my involvement in the security systems of those companies, I can state unequivocally that enactment of S. 1018 would be most detrimental to the labor relations of Wells Fargo and all other armored car companies in the United States. I wish to inform the Committee of Wells Fargo's strong opposition to any amendment of section 9(b)(3) of the National Labor Relations Act and to explain why we object to S. 1018 in particular.

The 1953 ruling of the National Labor Relations Board that first held armored car guards to be guards within the meaning of the Act, and that consistently has been followed since then, was the decision in Armored Motor Service Company, Inc., 106 N.L.R.B. 1139. I was one of the two witnesses in that case and can say that the reasons for including armored car guards within the coverage of section 9(b)(3) are as valid today, if not more valid, as they were thirty-three years ago.

Wells Fargo performs a unique service that is vital to the commercial life of our nation. We provide the guarded transport of valuable items as diverse as coin and currency, negotiable instruments, jewelry, furs, and weapons-quality nuclear materials. Our customers range from the corner druggist to the nation's largest corporations. We serve financial institutions (including Federal Reserve Banks), jewelry stores, wholesale warehouses, retail stores, manufacturing plants, and government at all levels (both civilian and military). In short, Wells Fargo is a company whose services are critical to employers in all segments and at all levels of our economy.

Because our company is one of America's largest employers of guards, we are no stranger to the operation of section 9(b)(3) and its interpretation and application over the years. Nor are we a stranger to the repeated attempts by the Teamsters and others to amend the section. Thus, today is not the first occasion on which I have appeared before this Committee to register Wells Fargo's opposition to changes in section 9(b)(3).

My previous appearance here, when this was known as the Committee on Labor and Public Welfare, came eight years ago during Senate consideration of the Labor Reform Act. The House already had approved the Act, including provisions similar to those contained in S. 1018 to limit section 9(b)(3)'s coverage to "plant guards." This Committee saw the danger of such a limitation and approved, by an overwhelming 11 to 3 vote, an amendment offered by Senator Riegle to replace the House-approved changes. The Riegle Amendment was aimed at insuring that armored car guards, courier guards, and guards working for contract security services would remain within section 9(b)(3)'s coverage.

By refusing in 1978 to adopt the House-approved reduction in section 9(b)(3)'s coverage, the members of this Committee demonstrated a clear understanding of the realities that confront armored car and other non-plant guards in the American workplace. Those who favor restricting section 9(b)(3) to "plant guards" are undaunted, however, and are attempting to achieve through S. 1018 precisely what this

Committee refused to permit eight years ago. I urge you to reject S. 1018 and to show the same wisdom today that you demonstrated in 1978.

S. 1018 is based on two underlying assumptions. First, the bill assumes that armored car guards are not guards. Second, it assumes that these employees are not subject to the threat of divided loyalty that is at the heart of section 9(b)(3). Based on my experience during more than thirty-five years in the armored car business, I can tell you that those assumptions reflect a fundamental misunderstanding of the realities of the armored car industry. If S. 1018 is enacted to incorporate those flawed assumptions into the labor policies that govern Wells Fargo and other armored car companies, our ability to meet the needs of our customers safely and efficiently will be threatened.

Webster's defines a guard as one who "protects from harm, defends." According to that or any other definition, armored car crewmen are guards. Moreover, the duties of armored car guards expose them to the same threat of divided loyalty that confronts typical plant guards. Indeed, that threat may be greater for armored car employees. These simple facts are made clear by a look at the dangers that threaten our employees daily as they perform their duties.

Members of this Committee undoubtedly have read the recent press accounts of the gunfight in Miami that left two FBI agents dead and several others wounded. The criminals who the FBI was pursuing were members of the Marielito gang that has victimized the armored car industry in south Florida since 1982. That gang is considered to be responsible for at least fifteen robberies of armored trucks. Last June, they attacked one of Wells Fargo's employees while he was making a pickup at a Southern Bell office, shot him fatally through the chest and stole $40,000. The Marielitos use paramilitary tactics in carrying out their robberies, and are well armed with M-16 rifles, shotguns, grenades and other explosives.

Violent attacks, unfortunately, have become a fact of life in the armored car industry in some areas of our country. In 1985, there were 22 attacks on Wells Fargo operations alone. The most well-publicized incident occurred in New York when four individuals linked to the Mafia burrowed into one of our terminals and overwhelmed four guards, escaping with nearly $8 million in currency. Incidents far more common, however, have involved attacks on our guards who are making routine deliveries. Of the 22 incidents that occurred during 1985, 14 involved the use of handguns, shotguns or other weapons to kill or injure our armored car guards. In exchanges of gunfire during attacks in 1985, one Wells Fargo guard was killed, three were wounded, and two robbers that we know of were wounded. I invite Senator Gorton and all other supporters of S. 1018 to accompany one of our armored cars on a typical run through the streets of Miami to see for themselves whether our employees are guards.

The growing number of crimes committed against our guards is due primarily to the increasing use and importance of the armored car industry in our banking system. It has become critically important that large amounts of money be moved as quickly as possible from retail establishments to commercial banks and on to Federal Reserve banks because of the desire on the part of both retailers and commercial banks not to lose interest on deposits. Of equal importance, the customers of armored car companies, including commercial banks, want as little currency as possible on their premises for security and liability reasons. As the volume of these transfers has increased over the years, it has not gone unnoticed by terrorists, the Mafia and other criminal elements that the most vulnerable link in this financial chain is the point at which funds are being transported from one heavily secured area to another by armored car. That is precisely the point at which violent crimes committed against crewmen for Wells Fargo and other armored car companies have increased in recent years.

At Wells Fargo, we have taken many steps to prepare our armored car guards for the criminal threat that faces them. We train our guards to expect a robbery at any time, particularly when they leave the truck with a currency delivery. Each guard is uniformed, and carries a .38 caliber handgun at all times while on duty, both inside and outside the terminal. Shotguns are carried in the cab of each armored vehicle. Each guard receives special training in weapons handling and defensive measures to be used if attacked, and they must maintain their weapons proficiency to continue their employment with Wells Fargo. As the sad statistics referred to above illustrate, our armored car guards risk their lives on a daily basis to perform their duties. We make every effort to insure that they are well equipped to avoid that risk.

Our operations also are designed to avoid the threat of crime. Each of our armored vehicles typically is manned by a driver guard, a messenger guard and, depending on the circumstances, a third or fourth guard. The driver guard operates the armored car inside a locked. bulletproof cab, while the messenger guard leaves the vehicle for the purpose of picking up and/or delivering currency. The third and fourth guards accompany the messenger guard and act as his backup. When the messenger and guards leave the vehicle, the safety of those individuals is the responsibility of the driver guard. He surveys the area for signs of any suspicious activity and signals the other two guards should anything unusual be spotted. He also is in communication with the terminal and operates sirens and other devices to scare off would-be robbers should an attack occur. The driver guard is equipped with a shotgun in addition to his handgun, and special ports are built into the cab of the vehicle for firing at attackers. When attacked, all of the guards are expected to do whatever is appropriate, including using weapons, to foil the robbery and, if possible, apprehend the robbers.

Significantly, the armored vehicle itself is one of the best defensive weapons that we have. Our driver guards are trained in how to respond when attacked, which includes positioning the vehicle between the attacker and the victim, chasing the robbers, and otherwise using the vehicle to protect the guards on foot.

I respectfully submit to this Committee that any employee who faces the threats of crime that Wells Fargo's armored car crewmen face each day, and any employee who must perform the duties and procedures that we require of our crewmen, unquestionably is a guard. The proponents of S. 1018 who say that an armored car guard is nothing more than a "truckdriver with a gun" are grossly mistaken. Armored car employees operate in a totally different manner than common carrier truck delivery personnel. They are not only responsible for transporting extremely valuable cargoes, but also are required to protect those cargoes from attack. That is why contract armored car companies like Wells Fargo, not common carriers, are retained to transport currency and other valuables.

I also submit to this Committee that it is wrong to say that an armored car guard is merely a "bailee" of the property that is being transported, and thus is not a guard. An armored car guard is indeed a bailee of the property being transported, but the drafters of section 9(b)(3) made clear that bailees can and should be treated as guards. According to the Conference Report on section 9(b)(3), no bargaining unit is appropriate if it combines nonguard employees with persons employed "as a guard to enforce against . . . other persons rules to protect property belonging to the employer or for which the employer is responsible . . . ." Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess. 47 (1947). Moreover, the crewmen of a company like Wells Fargo assume a special duty to protect and guard the property that they transport. Thus, the fact that an armored car company like Wells Fargo, or its employees, may be a bailee does not affect the applicability of section 9(b)(3). We employ persons as guards to protect the property for which we are responsible, and those employees clearly are guards who should be covered by section 9(b)(3).

Finally, it should be stressed that the crewmen of armored car companies such as Wells Fargo often function as if they were the customer's own guards when they are on the customer's premises. Our guards become immediately liable for the contents of the shipment from the moment that it is entrusted to their care on the premises until it is finally delivered to the designated consignee. To carry out that responsibility, our guards frequently secure the customer's premises while making a delivery or pick-up.

Understanding the realities of the armored car industry as I do, I am amazed that anyone can contend that an armored car guard is not a guard. The proponents of S. 1018 operate on a dangerous and incorrect assumption in making that contention. S. 1018' proponents also are mistaken in adopting the second assumption that underlies the bill -- that armored car guards are not subject to the threat of divided loyalty at which section 9(b)(3) is aimed. This second error is revealed by looking at the origins of section 9(b)(3) and how it has been interpreted and applied during the last thirty years.

Section 9(b)(3) was enacted in 1947 as part of the Taft Hartley Amendments to the National Labor Relations Act (NLRA). Congress passed the provision in response to the Supreme Court's decision in NLRB v. Jones & Laughlin, 331 U.S. 416 (1947), which had upheld an NLRB order requiring an employer to recognize the same union that represented his production workers as the bargaining representative for a unit of guards. Permitting guards to join a union with non-guard members, Congress recognized, would expose the guards to a threat of divided loyalty that could interfere with the faithful performance of their duties. If the guards were asked to enforce rules and protect property against fellow union members engaged in a strike or other collective action, they might shirk their duties because of loyalties or obligations to the union.

Congress incorporated section 9(b)(3) into the NLRA to deal with this problem. The section contains three primary components. First, the "mixed unit" restriction provides that guards and nonguard employees may not be placed in the same bargaining unit. Second, the "mixed union" restriction prohibits the NLRB from certifying as the bargaining representative for a unit of guards any union that admits nonguard members or that is directly or indirectly affiliated with another union that admits such members. Finally, section 9(b)(3) broadly states that these restrictions are to apply to "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." Thus, Congress intended to insulate all types of guard employees from the sorts of union influences that might interfere with the faithful performance of their duties.

Although section 9(b)(3) broadly describes the duties of guard employees, Congress left it to the NLRB to determine precisely which employees should be treated as guards. By examining the duties of particular employees to determine if the threat of divided loyalty is present, the Board has applied the section to plant guards and watchmen, guards who work for alarm service companies or contract security agencies, courier guards, and armored car guards. Recognizing section 9(b)(3)'s natural limits, however, the Board has refused to extend it to "gatemen" and "tower observers" at a safari amusement park, Lion Country Safari, 225 N.L.R.B. 969 (1976), or to employees who work for a movie studio regulating the flow of traffic to reduce extraneous noise during filming, Deluxe General, Inc., 241 N.L.R.B. 229 (1979). Only those employees who enforce rules and protect property and persons, *and* who are faced with the threat of divided loyalty, have been included within the provision's coverage.

As far back as 1953, the NLRB concluded that armored car guards should be covered by section 9(b)(3). In Armored Motor Service Company, Inc., 106 N.L.R.B. 1139, 1140, the Board recognized that:

> A conflict of loyalty could arise, for example, if the guards should be called upon to deliver money or valuables to one of their customers whose employees were represented by the same union as represented the armored-car guards and the employees of the customer were on strike and picketing the premises of the customer.

Whether dominated by Republicans or Democrats, "pro-management" or "pro-labor" members, the NLRB repeatedly has endorsed this conclusion. See, e.g., Brinks, Inc., 274 N.L.R.B. No. 144 (1985); Wells Fargo Armored Service Corp., 270 N.L.R.B. No. 106 (1984), aff'd sub nom., Truck Drivers Local Union No. 807 v. NLRB, 755 F.2d 5 (2d Cir.), cert. denied, 106 S.Ct. 225 (1985); Dunbar Armored Express, 211 N.L.R.B. 687 (1974); American District Telegraph Co. of the Cleveland Company, 160 N.L.R.B. 1130 (1966). Cf. Sentry Investigation Corp., 198 N.L.R.B. 1974 (1972); Bonded Armored Carrier, Inc., 195 N.L.R.B. 346 (1972). Throughout the thirty-three year period since the Armored Motor Service decision, the Board has emphasized "that it makes no difference that the property to be protected is that of a customer of the employer rather than that of the employer." Dunbar, 211 N.L.R.B. at 689.

The federal courts uniformly have approved the Board's treatment of armored car guards. The Court of Appeals for the D.C. Circuit, for example, has ruled that since section 9(b)(3) was "designed to minimize the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer against a fellow union member," it clearly is reasonable to conclude that the danger will arise if a nonguard union is certified to represent a unit of armored car guards. Drivers, Chauffeurs, Warehousemen and Helpers, Local No. 71 v. NLRB, 553 F.2d 1368, 1372-73 (D.C. Cir. 1977). Other courts also have endorsed the Board's policies on armored car guards. See, e.g., Truck Drivers

Local Union No. 807 v. NLRB, 755 F.2d 5 (2d Cir. 1985); Int'l Brotherhood of Teamsters, Local 344 v. NLRB, 568 F.2d 12 (7th Cir. 1977); Fuchs Ex Rel NLRB v. Teamsters Local Union No. 671, 398 F. Supp. 243 (D. Conn. 1975); Humphrey v. Drivers, Chauffeurs & Helpers Local 639, 369 F. Supp. 730 (D. Md. 1974).

Despite over three decades of these and other NLRB and court decisions consistently applying section 9(b)(3) to armored car guards, Senator Gorton, the primary sponsor of S. 1018, has asserted that the term "guard" has been improperly expanded to include employees other than plant guards. He has stated that under S. 1018:

> Employees engaged in the transportation, delivery, or safekeeping of property shall not be deemed to be guards when responsible solely for the property of the employer's customers. Such bailees would not be considered guards simply because they carry firearms, are bonded, must pass a security clearance, are commissioned as law officers, or are allowed access to the customer's premises for the purpose of delivering cargo.

131 Cong. Rec. S 4689 (daily ed. April 26, 1985) (statement of Sen. Gorton). Senator Gorton has stated that S. 1018 "thus states explicitly what has always been in the clause implicitly -- that [section 9(b)(3)] applies only in the context of plant guards." These assertions, however, beg

the significant question of why the NLRB and the federal courts consistently have read section 9(b)(3) to extend to other types of guard employees. The fact of the matter is, as the Court of Appeals for the D.C. Circuit has stated, "[n]othing in the [legislative] history evinces an intent to limit the application of Section 9(b)(3) to plant guards," and such a fundamental restriction presumably "would have found expression in the statutory language of the provision." Local No. 71, 553 F.2d at 1372-73.

In addition to ignoring the considerable body of law that has applied section 9(b)(3) to armored car guards, Senator Gorton has refused to acknowledge the relevance of the divided loyalty problem to armored car guards. When he introduced S. 1018 on the floor of the Senate, Gorton stated that section 9(b)(3) "is an appropriate measure designed to minimize the danger of divided loyalty that arises when plant guards are called upon to enforce the employer's rules against other employees or to maintain order on the premises during labor strife." 131 Cong. Rec. S 4888 (daily ed. April 26, 1985) (statement of Sen. Gorton). If "the danger of divided loyalty" confronts plant guards, why is it not also present for armored car guards and other types of non-plant guards? As the Board explained in the Armored Motor Service decision, armored car guards could face a conflict of loyalties anytime they make a delivery to or from an establishment whose employees belong to the same union as the guards.

If S. 1018 were enacted and the union local representing Wells Fargo's armored car guards were affiliated with the same union representing the employees of one of our customers, the threat of divided loyalty would arise every time a labor dispute occurs. If the armored car guards sympathized with a strike on our customer's premises by refusing to cross a picket line, they clearly would be in breach of their duty to protect the property entrusted to them. A textbook example of the divided loyalty problem would result. In addition, the guards would be placing the customer at additional risk because large amounts of currency or other valuables could not be removed safely from the site. In short, if S. 1018 were approved, labor strife would threaten the reliability of the armored car industry, and the reliable, secure transport of America's currency and other valuables no longer would be possible.

Based on the policies behind section 9(b)(3) and the practical realities of the day-to-day operations of armored car companies, it is clear that armored car guards should be covered by section 9(b)(3). The proponents of S. 1018 operate on faulty assumptions about an industry whose reliable, secure operation is vital to the American economy. I urge the members of this Committee to reject those assumptions and avoid the disastrous results that enactment of S. 1018 would bring about.

Thank you for this opportunity to testify.

Senator NICKLES. Thank you, Mr. Cole. I appreciate your comments. You mention that you were president or owner of a company that provides risk insurance, is that——

Mr. COLE. No, we provide risk survey inspections that are required by the insurance underwriters who do underwrite those risks.

Senator NICKLES. Let me ask you a question on that line. You mentioned a couple of the episodes of violences which we are all too familiar with, I am afraid, particularly the recent case in Miami. Have the insurance rates gone up dramatically in the last several years?

Mr. COLE. The insurance rates have gone up tremendously and the deductibles on practically all of the policies that I know of have doubled and tripled and quadrupled.

Senator NICKLES. We have several people who own or operate these types of services. Mr. Koehler, you mentioned that your company is based in New York City or New Jersey?

Mr. KOEHLER. Yes, sir.

Senator NICKLES. You provide services in and out of the Federal Reserve Bank in New York.

Mr. KOEHLER. Yes, sir.

Senator NICKLES. You move anywhere from $200 to $500 million a day.

Mr. KOEHLER. That is correct.

Senator NICKLES. I think the panel was unanimous against this legislation, is that correct?

Mr. KOEHLER. Yes.

Senator NICKLES. Part of your concern which you alluded to toward the very end of your statement was requesting this committee to review the Crime Commission's report.

Mr. KOEHLER. I did.

Senator NICKLES. Do you feel that if this bill was passed, that there are elements of organized crime, possibly in New York or other areas, that would exert some problems?

Mr. KOEHLER. I believe that. My experience up there in the past 27 years has shown that to be the case, in my judgment.

Senator NICKLES. They have that problem already or would the problem be exacerbated by this bill?

Mr. KOEHLER. I have been fortunate in having avoided that problem. My company does not happen to be represented by either the Teamsters or another union, so I have avoided what I consider that problem. It is a judgment call. I have many members or employees who happen to be ex-Teamsters, local 820, and I happen to trust their judgment on the issue. Our people have elected not to join any union to date.

Senator NICKLES. But you have heard from them or others that there are some problems there?

Mr. KOEHLER. Let us say that the names mentioned in "The Edge," the President's Crime Commission report, are not unfamiliar to me or my people.

Senator NICKLES. Again, this is not a hearing on the Crime Commission's report. However, the report does bear some input if you are talking about cases having some corrupt locals. If they are involved in transporting money, it could be a very serious problem.

Mr. **Koehler**. I believe it would be.

Senator **Nickles**. To all of our panelists, I thank you very much for your appearance before the committee today. I hope that you will be responsive to any rquests for additional questions from myself or other committee members.

We have one additional panelist, Eugene Methvin.

Mr. Methvin, you are welcome. You are presently senior editor of Reader's Digest and also a former member of the President's Commission on Organized Crime?

STATEMENT OF EUGENE H. METHVIN, SENIOR EDITOR, READER'S DIGEST, AND FORMER MEMBER, PRESIDENT'S COMMISSION ON ORGANIZED CRIME

Mr. **Methvin**. Senator, that is correct.

Senator **Nickles**. Welcome before the committee.

Mr. **Methvin**. Thank you. It should be obvious, since the Commission went out of existence on March 31 that I am not representing the Commission. I am here as a former Commissioner, as a journalist with decades of experience in reporting on crime and law enforcement and as a citizen to share with you some of my experience and conclusions

The legislation you are considering, S. 1018, the guards bill, was introduced routinely a year ago in what I am sure was ordinary legislative responsiveness to the pleas of labor union constituents. This bill, however, takes on a vastly different coloration in the light of subsequent events.

First, last fall Roy Williams, former president of the Teamsters, testified in a Kansas City trial that he had lived in terror of a Mafia hit and had been controlled by the La Cosa Nostra crime syndicate boss Nick Civella during most of his 30-year career in the Nation's largest union.

In a deposition before our Commission, he testified that every major local that he knew of was dominated or in some way affected by organized crime. He testified that there are areas of the country, particularly in the Northeast, where he did not even dare go and intervene and involve himself in Teamster affairs because the gangster domination was so complete. In his Commission deposition he also testified about his conversations with Jackie Presser which revealed Presser's involvement in the Cleveland mob. In a videotaped CBS interview last December, Williams said Presser as Teamster president is as much under the LCN control as he was.

The second event is that in the same trial in Kansas City, Angelo Lonardo, the No. 2 boss in the Cleveland gang, became a Government witness. He testified about his role in elevating both Williams and Jackie Presser to the Teamster presidency.

Senator **Nickles**. Mr. Methvin, our committee will review the Commission's report that you have worked on. I am also very interested in your statement of how that applies to this legislation that we have before us.

Mr. Methvin. Yes, sir. Well, as I was saying, the President's Commission last month in its report released the deposition of Jackie Presser. On page 150 of that transcript, you will find a dialog of particular relevance to the guard bill which you are considering

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today. The Commission subpoenaed the transcript of one of Presser's joint council meetings and there he stated, "They are appointing a new person as the chairperson of the National Labor Relations Board. There have been two names submitted by me for the proper people for appointment. I am positive we are going to get one of the two. I interviewed both people. We have firm commitments that the armed guards will come under the jurisdiction of being unionized." That was the end of Presser's transcript statement and the Commission attorney said, "Sir, who did you receive those firm commitments from?" Presser's answer was that he claimed his fifth amendment privilege. That was one of 252 times that day he fled behind the fifth amendment.

Now, apparently Presser as Teamster president has given a high priority in his union's lobbying efforts here in Washington to getting, either through executive branch contacts or through legislation, power to sign up armored car guards and couriers. The guard bill is especially important to La Cosa Nostra gangs in New York who helped engineer Presser's election. There the Genovese and Gambino families have especially strong positions in the Teamster and Longshoremen's locals.

To appreciate how important unions are in their racketeering enterprises, I recommend that you read Nick Pileggi's current bestseller, "Wise Guy—Life in a Mafia Family." There you will see how the mob used control of unions to maintain a spy network at the John F. Kennedy Airport. This network provided a constant stream of tips about rich cargoes for thefts, armed robberies, and hijackings. It resulted in the largest armed robbery in the Nation's history up to that time, the December 1978 Lufthansa terminal heist of $5 million in cash and $875,000 in diamonds and other gems.

Whenever employers would identify and try to fire a suspected Mafia tipster or spotter, the gangsters would use their union contacts and connections to raise grievances, make major grievances or threats of strikes or actual strikes. Now, the President's Commission recommended that the business community insulate itself from known or suspected gangster enterprises, and that would certainly include unions.

The guard bill would remove one of the buffers which employers can use to protect themselves from such enterprises. It would go contrary to the direction of our recommendations. Specifically, it would require employers to bargain with the Teamsters to represent their armored car guards and couriers. In the real-world context in many areas this would amount to putting the fox in charge of the henhouse.

Senator, this morning we had Teamster representatives and Teamster members brought here before us to sit in the audience. One year ago today, I was sitting in our hearing in Chicago, the President's Commission on Organized Crime in the Federal courthouse there. A Teamster rank-and-file member attended that hearing that day on his own initiative to see and hear what was going on there. When he got back to his job, a 6-foot 4-inch Teamster steward from local 705 beat him up because he had dared to attend—that is his first amendment right—a proceeding of our

Government, and as he was beating him, that big shop steward asked, "Do you think you want to go to any more hearings?"

Now, we have heard a lot of crocodile tears here today, Senator, about freedom of choice, freedom of choice for union members. But I would ask you to look at our hearing record look at the record of the *Sheeron-Boffa* case which we ventilated considerably. Look af the testimony of Bobby Rispo, who was a self-admitted, confessed leg breaker for the Teamsters union and for the labor leasing companies over there in Wilmington, DE and around Philadelphia.

Talk about freedom of choice. As Rispo himself said, "That operation sold Teamster members back down the river into plantation days work rules." It was a three-legged racket run by Teamster officials, corrupt corporate officials, including a number of Fortune 500 companies, and La Cosa Nostra gangsters who provided the muscle to terrorize any Teamster members who dared to protest, and has provided the secret channels for running a national sweetheart contract racket.

Senator NICKLES. Again, we are going to review the President's Commission on Crime report. They made several legislative recommendations which we will take a look at. Also we will see if the current statutes that we now have on the books are being enforced as aggressively as they possibly should

Pertaining to this legislation that we have before us, Senator Gorton's bill, S. 1018, is it your belief that if we pass this bill that you will see greater organized crime influence in the armored car business, the delivery business and the guard business?

Mr. METHVIN. Senator, I have not the slightest doubt. The December 1984 Reader's Digest carried an article I did called "Terror Network U.S.A." That article hinged on the Brinks armored car robbery by a gang of terrorists in Nyack, NY, and in working on that story, I had to go considerably into the security measures, I talked with the police and sat in the courtroom and listened to some of those trials and so on.

One of the major problems of armed robbery gangs is simply to check the schedule of delivery, the time and place of delivery, find out when the truck is empty and when it is full, and where do you hit it, and this is exactly the kind of intelligence that the gangsters use their union connections, to learn.

Senator NICKLES. Mr. Koehler mentioned that he felt like there are still some problems, potential problems in New York and other areas with possibly particular locals. Do you believe those problems exist?

Mr. METHVIN. Yes, sir, they are still there in New York, no question in my mind about it.

Senator NICKLES. Do you believe there are problems throughout the country?

Mr. METHVIN. Throughout the country?

Senator NICKLES. Yes.

Mr. METHVIN. Yes, sir. Here again, in the *Sheeran-Boffa* case that I mentioned, we had corrupt Teamster officials involved in that from Puerto Rico to California. Incidentally, this case was very well ventilated by the Senate Permanent Subcommittee on Investigations as well as our Commission.

Senator **Nickles**. I am not a member of that committee but I have been involved with it in years past, mainly because we worked on joint legislation.

Mr. **Methvin**. I know that you were cosponsoring Senator Nunn's labor racketeering bill which I watched very closely. It is interesting that it took the Senate passing it three times and the House did not pass it at all until they were backed into a corner more or less, facing election in 1984.

Senator **Nickles**. We worked on that legislation and recognized that there are some serious problems. Again, this committee hearing today is not on that; it is on S. 1018. We have had several people in addition to yourself mention that they felt like there might be some corrupt influences if this legislation were passed which would bear on the security of many individuals and companies. That is what we are trying to dig into today and we will probably get into in the Commission's report after it is further processed through the Attorney General's office.

Mr. **Methvin**. Your statement a few moments ago that you intend to review those recommendations and that report makes me most happy.

In closing, I would like to say that the Commission found one overriding reason for the screaming scandal of labormanagement racketeering today, and that was the lack of political will, and where the Congress is concerned that involves and translates into a lack of effective oversight, of the nagging, prodding kind of oversight that it takes to to get the Federal bureaucracy moving on any quarter but particularly in this front we are talking about the Department of Labor in overseeing union elections and making the Landrum-Griffin bill a living thing and we are talking about the Department of Justice and its failure to utilize the civil statues, civil RICO.

The Harvard professor today said that he did not see any reason to penalize a whole union because a few officers had been convicted criminally. Well, I would like to address that point. He is playing on a standard that exists of proof beyond a reasonable doubt in the world of criminal prosecution, but the Congress very wisely said that we cannot succeed in cleansing our unions if we rely only upon the criminal standard of proof, and, therefore, they created a civil Racketeering Influenced and Criminal Organizations law called the Organized Crime Control Act of 1970, and the Justice Department has used that law exactly six times in 15 years and only once against a corrupt racket union, and I urge you and this committee to look very hard at that.

The Commission's statement on this point was,

> The Government's efforts to remove organized crime's influence over unions and legitimate business had been largely ineffective. This situation does not stem simply from too few laws or unavailable remedies. It rises from a lack of political will, a lack of fixed responsibility, and a lack of a national plan of attack.

If you would take a good look at our hearings and the record of the last 16 years or the last 30 years, you will see how badly this kind of nagging, prodding oversight I am talking about is needed.

Finally, Mr. Chairman, I would like to offer for your inclusion in the record a supplemental statement that I filed as part of that report, "The Edge," a dissent I filed to the Commission's final report, and the U.S. Circuit Court of Appeals decision in a case called *Bliss* v. *Holmes,* which involved an ordinary Teamster who tried to take on the powers that be and it shows you how the Landrum-Griffin Act has been a dead letter in so many ways, including in at least one Federal District Court in Michigan.

[The prepared statement of Mr. Methvin with attachments follows:]

Statement of Eugene H. Methvin
on S. 1018 before the U.S. Senate Subcommittee on Labor
April 24, 1986

Mr. Chairman:

My name is Eugene H. Methvin. I am a journalist and have been reporting on crime and law enforcement -- among other things -- for more than 30 years. I am a senior editor in the Washington bureau of the Reader's Digest. Also, over the past three years, thanks to President Reagan, I had the challenging experience of serving as a member of the President's Commission on Organized Crime. Since that commission went out of existence on March 31, it should be obvious that I do not speak for it. I am here simply as a citizen, a journalist and a former commissioner, to share with you some of the knowledge gained in those roles.

The legislation you are considering, S. 1018, the "guards bill," was introduced routinely a year ago in what I am sure was ordinary legislative responsiveness to the pleas of labor union constituents. This bill takes on a vastly different coloration, however, in the light of subsequent events.

First, last fall former Teamster President Roy Williams testified in a Kansas City trial that he had lived in terror of a Mafia "hit" and had been "controlled" by LCN crime boss Nick Civella during most of his 30-year career in the nation's largest union. In a deposition before our commission he testified that every major Teamster local had some tie to the syndicate; and admitted he did not even dare involve himself in Teamster affairs in some areas, particularly the Northeast, because the gangster domination of Teamster locals was so complete. Williams also testified he had had conversations with Jackie Presser in which Presser revealed his involvement in gangland wars within the Cleveland LCN family; and further, that Presser had offered him a bribe for his help in securing a Teamster pension fund loan and further, that Presser offered to fix a federal case for him in return for a bribe. In a videotaped CBS interview last December Williams said Presser as Teamster president is as much under LCN control as he was.

Second, Angelo Lonardo, the No. 2 boss in the Cleveland LCN gang, became a government witness last fall in the same Kansas City trial. The FBI's memoranda of some of Lonardo's debriefings were also released. Lonardo's testimony and FBI memoranda give us new insider testimony on how the crime syndicate ran the Teamsters through a "shadow government." Lonardo told how he and other Mafia bosses had engineered the election of Roy Williams in 1981 and later the elevation of Jackie Presser in 1983. Incidentally, Lonardo's testimony is corroborated by FBI intercepts from a "bug" planted in a Leavenworth penitentiary visiting room where the imprisoned Kansas City boss Nick Civella, Williams's controller, gave his brother Carl instructions on how to rig the election of Williams.

Finally, last month the President's Commission released its August 13, 1985, deposition of Jackie Presser in which Presser fled behind the Fifth Amendment privilege 252 times. Page 150 of the transcript is especially relevant to the "guard" bill you are considering today. The commission subpoenaed the transcript of Presser's Joint Council 41 meeting of October 31, 1983. There Presser stated: "They are appointing a new person as the chairperson of the National Labor Relations Board. There have been two names submitted by me for the proper people for appointment. I'm positive we are going to get one of the two. I interviewed both people. We have firm commitments that the armed guards will come under the jurisdiction of being unionized." The commission attorney asked: "Sir, who did you receive those firm commitments from?" Presser as usual refused to answer.

Apparently, Presser as Teamster president has given a high priority in his union's lobbying efforts in Washington to getting, either through its Executive Branch contacts or through legislation, power to sign up armored car guards and couriers. The "guard bill" is especially important to the LCN gangs in New York who helped engineer Presser's election. There the Genovese and Gambino families have powerful control of Teamster and Longshoremen's locals. To appreciate the importance of unions in their racketeering activities, especially extortion, hijackings and fencing, I recommend you read Nick Pileggi's current best-seller Wise Guy -- Life in a Mafia Family. You will see how the Mob used control of unions to maintain a spy network at the John F. Kennedy Airport. This network provided a constant stream of tips about rich cargoes for thefts, armed robberies and hijackings. It resulted in the largest armed robbery in the nation's history, the December 1978 Lufthansa terminal heist of $5 million in cash and $875,000 in diamonds and other gems. Whenever employers would identify and try to fire a suspected Mafia tipster or "spotter," the gangsters would order their union connections to raise a major grievance or to threaten or execute a strike. So the employers just "rolled over" and let their insurers and customers pay.

The Genovese gang has used unions the same way in Miami. In fact, with union political muscle they were able to prevent Dade County from passing an ordinance to provide a security program against cargo thefts on the docks. The unions shut down the surrounding ports and bused 1500 people to the commission chambers in opposition. The cargo thefts from Miami's main docks amount to an estimated $2 billion a year -- a "racket tariff" that is passed along to shippers and the consuming public. Just ask yourselves what kind of an uproar you would encounter here today if you were considering legislation to impose $2 billion in taxes on the American public. You can read about the Genovese and Gambino gangs' stranglehold on the East and Gulf Coast docks in the Permanent Subcommittee on Investigations hearing on waterfront corruption in February 1981 and the report of March 27, 1984. The President's Commission did a follow-up inquiry and found that today it is still "business as usual" on the waterfront.

The President's Commission recommended that the business community insulate itself to the maximum extent possible from organized crime enterprises. That would include unions. The "guards" bill would remove one of the buffers which employers can use to protect themselves from known or suspected Mob-connected enterprises. It would oblige them to bargain with unions which the President's Commission has found to be influenced by organized crime. Specifically, it would require them to bargain with the Teamsters to represent their armored car guards and couriers. In the real-world context in many areas, this would amount to asking the fox to guard the henhouse.

Senators, one year ago today the President's Commission on Organized Crime was holding our hearings on labor-management corruption in Chicago. I was the supervising commissioner for those hearings and the subsequent report, published six weeks ago. Sitting in our hearing that day was a rank-and-file Teamster member. When he returned to his job, a six-foot-four-inch shop steward of Teamster Local 705 beat him up because he had dared to attend a public meeting of a Presidential commission in the federal courthouse. While beating him, the shop steward asked, "Do you think you want to go to any more hearings?"

This is a sad and symbolic commentary on the state of union democracy in America today. How does it happen that four major international unions, with nearly three million members, are found to be under the domination of organized crime? It is now nearly 30 years since the McClellan labor racketeering investigations that were the "big story" when I came to Washington in 1958. It is 27 years since passage of the Landrum-Griffin Act which was supposed to be "the union man's bill of rights." It is 16 years since the Organized Crime Control Act passed, including the famous Racketeer-Influenced and Criminal Organizations law, known as RICO. It is 12 years since ERISA -- the Employee Retirement Income Security Act -- passed.

Yet organized crime control of unions and pension and welfare fund piracy seem to be as vicious as ever. Union members who dare to challenge their Mob overlords are beaten or murdered, sometimes in horrible fashion. Ben Medina, who quit his post in a Laborers International Union local in Philadelphia in January 1982 to run for higher union office, was beaten to death a few days later by gangsters who showed up at his house in the middle of the night wearing Halloween masks. In our Chicago hearings the President's Commission heard the former vice president of that union, Robert Powell, testify how Medina's murder and a campaign of threats and terror had persuaded him to retire rather than to challenge the LCN overlords of that union. We heard Laborers International President Angelo Fosco and Teamster President Jackie Presser flee behind the Fifth Amendment rather than answer questions concerning their racket connections. We heard Daniel Cunningham, an imprisoned labor racketeer, tell how he literally bought his union from an LCN gang figure; and how he organized plant guards at five nuclear power plants from Maine to Pennsylvania and shut the plants down by pulling his guards out on strike. You might want to call Cunningham as a witness. We heard tape recordings made via a court-authorized "bug" planted in the automobile of "Tony Ducks" Corallo, whom Senator McClellan and Bobby Kennedy termed one of the worst labor racketeering gangsters they encountered in the '50s. Tony Ducks is today the Luchese gang boss and serves on the Mafia "Commission," and he and his gangsters still control major unions in the New York area. We heard them boasting that the payoff envelopes they are extorting from employers, right out of the pockets of the consuming public, have become "so fat you can't carry them." The commission report reveals for the first time court-authorized FBI intercepts of Gambino gang boss Paul Castellano boasting about the Mafia control of the Longshoremen and the Hotel and Restaurant Workers. There is a recorded transcript of a Laborers International official in New York explaining how the gang-managed monopoly of the construction industry works, systematically harvesting kickbacks from all contractors on projects costing $2 million or more.

You cannot consider legislation like S. 1018 apart from the real-world context of what's going on out there in America today. This committee has a great challenge and a great opportunity before it. I know that you are under "new management," so to speak. You cannot remedy the past failings in legislative oversight, but you are certainly responsible for the future. The President's Commission found one overriding reason for the screaming scandal of labor-management racketeering today -- lack of political will; and where the Congress is concerned, that translates into a lack of effective, constant, nagging legislative oversight to prod and inspire the federal law enforcement bureaucracy into properly exploiting the statutory weapons Congress has given them. We especially need a fresh, hard look at the Labor Department's failure to safeguard union democracy by fair and vigorous investigation of union members' election protests. In this connection, take a look at the case of Teamster member Jerry Bliss who had to go to the Sixth Circuit Court of Appeals to get what the Landrum-Griffin Act guaranteed as a matter of right. See Bliss vs. Holmes, 721 F2d 156 (1983). And you should look at the Labor Department's misinterpretation of the Landrum-Griffin Act as it applies to the Teamsters' electoral process.

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The commission declared:

"The government's efforts to remove organized crime's influence over unions and legitimate business have been largely ineffective. This situation does not stem simply from too few laws or unavailable remedies. It arises from a lack of political will, a lack of fixed responsibility and a lack of a national plan of attack."

Let me urge this committee to take up the work the President's Commission began, to probe further and to do what we failed to do, which is to do a thorough critical review of the federal government's response to organized crime in the labor-management field.

Mr. Chairman, I would like to offer three items for inclusion in the printed record of your hearing and for your bedside table reading stacks:

1. A supplemental statement I filed with the President's Commission labor racketeering report.

2. A dissent I filed to the commission's final report.

3. The U.S. Circuit Court of Appeals decision in Bliss v. Holmes which further illustrates the failure of the Labor Department and at least one U.S. District Court judge to give effect to the Landrum-Griffin Act's guarantees of union democracy.

DISSENT OF COMMISSIONER EUGENE HILBURN METHVIN

I

There is simply no way to gloss over politely or to excuse this Commission's ignominious failure to discharge the most crucial task assigned to us by the President: to advise him and the Attorney General with respect to actions to improve law enforcement efforts directed at organized crime and to make recommendations concerning appropriate administrative and legislative improvements in the administration of justice. The Commission failed abjectly to undertake a comprehensive investigation and evaluation of the federal response to organized crime. We did not conduct the crucial inquiry and ask the hard questions that might have allowed us to make effective recommendations on a central concern in any evaluation of the federal response -- the performance of the U.S. Justice Department.

At the Commission's first public hearing in November 1983, this Commissioner submitted to Justice Department spokesmen a request for a study covering 14 questions regarding the Organized Crime and Racketeering Section's performance since passage of the 1970 Organized Crime Control Act. (Copy attached). The Commission itself later adopted this questionnaire. Yet the Justice Department failed to respond, and the Commission staff failed to press with sufficient vigor to obtain most of the data.

In June 1984 at a meeting attended by most members the Commission laid out a "battle plan," formally adopted by unanimous vote, for a series of hearings. The capstone hearing was to have been one on "the federal response," which would naturally focus upon the Justice Department and its Organized Crime and Racketeering Section and the Federal Bureau of Investigation.

Due to the Commission's own mismanagement and poor financial planning, that hearing was never held. As a pallid substitute, at a special meeting of a minority of commissioners on December 8, 1985, the attending commissioners agreed that the staff would conduct a series of interviews with Justice Department officials and former officials to evaluate past operations. The Commission staff without notifying concerned commissioners disregarded that agreement, and those interviews were not conducted. Other commissioners did not discover this action until the Commission's meeting of March 4, 1986, at which point most of the staff was disbanded.

Thus, a thorough independent investigation and evaluation of the Justice Department's performance against organized crime still remains to be done. Let it be clear that my concerns do not focus on the performance of this or any other Presidential administration or even particularly upon the Justice Department, per se. Rather, my concerns arise from the generic nature of bureaucracies and the need for periodic independent evaluations that may reorient, refocus and remotivate them. In this case, we were assigned to assess the permanent federal law enforcement bureaucracy that must be mobilized in any sustained strategic attack upon organized crime, of which the Justice Department inevitably must be the centerpiece. Yet whether we consider the Bureau of Indian Affairs, the Department of Defense or the Justice Department, all bureaucracies have their self-protective devices and defensive habits with which they fend off outside evaluation and criticism and even "interference" from the passing parade of politically selected Presidential appointees who represent the will of the American people expressed via the ballot box. One of those habits has gained among Washington denizens the sardonic label of "the NIH disease," which stands for "Not Invented Here" and represents one usual response among bureaucrats: "We did not think it up, so it cannot be worth doing." This trait is so ancient and innate that one of The Federalist essay authors, Alexander Hamilton, in No. 70 in 1787 remarked upon it:

> Men often oppose a thing merely because they have had no agency in planning it or because it may have been planned by those whom they dislike. But if they have been consulted, and they have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. Men of upright, benevolent tempers have too many opportunities of remarking, with horror, to what desperate lengths this disposition is sometimes carried and how often the great interests of

> society are sacrificed to the vanity, to the conceit and to the obstinacy of individuals.

In the context of the contemporary Justice Department, no less an observer than former Attorney General Griffin B. Bell has commented at length upon the permanent bureaucracy's armamentarium of devices and stratagems for fending off interference from the Presidential appointees who come into their midst for limited terms of stewardship in behalf of the American people. See "Curbing the Bureaucracy," Chapter 2, Bell, Griffin B., with Ostrow, Ronald J., Taking Care of the Law (New York: William H. Morrow & Company, 1982).

II

The career prosecutors and investigators of the Justice Department and the Federal Bureau of Investigation have displayed admirable dedication and competence in mounting effective investigations and prosecutions of organized crime. The Reagan Administration have given their efforts high priority and unstinting support and leadership. The Justice Department in the first four years of the Reagan Presidency obtained federal court authorizations for 733 electronic surveillances, compared to only 326 in the preceding four years. These investigations are now paying off. In the four years 1981-84 the Justice Department approved 351 criminal RICO prosecutions compared to only 217 in the entire previous ten-year life of the act. In the past three years, the heads of 16 of the nation's 24 La Cosa Nostra families have been indicted, and many of them are already in prison. The president of the nation's largest trade union, Roy Williams of the 1.9-million-member International Brotherhood of Teamsters, was convicted and imprisoned. The first civil RICO action ever against a union was successfully pressed against Teamster Local 560 in New Jersey so that the racket bosses who dominated this huge union for decades have been expelled from office and their union placed under court trusteeship until free elections can be held to return it to its members. The Federal Bureau of Investigation and Justice Department officials responsible for this record have displayed magnificent dedication and superb individual craftsmanship in investigating and prosecuting particular criminal cases. But as a collective institution, given the inherent limits of the criminal prosecution "body count" strategy, they fall badly short of mounting the effective root-and-branch attack on the entrenched rapacity of organized crime Congress ordained in 1970. The American people have a right to demand the fulfillment of that promise.

III

For 20 years the Justice Department has resisted reform of its Organized Crime and Racketeering Section and that bureaucracy's rigid and narrow devotion to case-by-case criminal prosecutions to put gangsters behind bars. Success is measured by "body counts" and by the celebrity of trials and defendants convicted. (See Profile of Organized Crime: Great Lakes Region, hearings before the Senate Permanent Subcommittee on Investigations, 1984, statement of Staff Investigator Fred Asselin, pages 287-326, esp. 298). a 1967 Presidential commission recommendation was to raise the section to division status, analogous to the Antitrust Division, and give it both criminal and civil sections. This organizational change would ensure that the Justice Department's racket-busters would give due attention to the civil as well as the criminal weapons in its statutory armory. (See my supplemental statement in the Commission's January 1985 report, THE EDGE: Organized Crime, Business and Labor Unions). as the Commission noted, "Labor racketeering is not easily deterred by prosecutive efforts that merely 'court bodies' as a measure of success. Instead, a new strategy must be developed to bankrupt individual mobsters and to discourage union officers, employers and public officials from accommodating organized crime." (Id., section One).

That "new strategy" was adopted by Congress as part of the 1970 Organized Crime Control Act in the civil remedies of the title called Racketeer Influenced and Corrupt Organizations (RICO). For most of that statute's life, the Justice Department's career prosecutors have simply ignored civil RICO weapons. Its prime Senate sponsor, Senator John L. McClellan, declared civil RICO "provides a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains." (116 Congressional Record 591). Yet the Justice Department's career racket-busters gave civil RICO the typical bureaucratic "Not Invented Here" ho-hum response. In 15 years the Justice Department brought only six civil RICO actions: (1) U.S. vs. Coli, unreported case failed in the Northern District of Illinois (date unknown); (2) U.S. vs. Cappetto, 502 F2d 1351, 7th Circuit (1974); (3) U.S. vs. Winstead, 421 F.Supp. 295, Northern District of Illinois, 1976; (4) U.S. vs. Ladmer, 429 F.Supp. 1231, Eastern District of New York, 1977; (5) U.S. vs. International Brotherhood of Teamsters Local 560, 581 F. Supp. 289 (1984), affirmed, Third Circuit, December 26, 1985; (6) U.S. vs. Barnett, complaint filed in May 1985 in the Middle District of Florida.

Against the Justice Department's record of only six civil RICO cases in 15 years, state and local governments have done at least twice as well; they brought 13 reported cases.

The last two of the six federal civil RICO cases deserve special comment. The Florida case is the first suit ever under civil RICO seeking treble damages for Uncle Sam and the taxpayers. Defendants are two businessmen and three companies previously convicted under criminal RICO and other offenses involving a massive fraud in obtaining Defense Department laundry contracts, and the government seeks $47 million. The Local 560 Case is the only civil RICO action ever brought that seems to fulfill the high hopes of Senator McClellan and other RICO sponsors. The judge discharged the union's officers, ending 20 or more years of domination by the LCN's Genovese family gangsters, and ordered a free election after an 18-month "cooling-off" period. Each action could be a model for federal racket-busters everywhere. Under civil RICO the Attorney General is authorized to sue on behalf of victims of patterns of racketeering, as in the Local 560 case, and he or court-appointed trustees could seek treble damages from piratic health and welfare fund trustees and other racket-allied perpetrators.

Indeed, Assistant Attorney General Stephen S. Trott of the Criminal Division on May 20, 1985, told the Senate Judiciary Committee: "We hope to build upon the legal principles established in Local 560, to produce similar cases in the future . . . The Local 560 case, in many ways, has opened our eyes to the potential of civil RICO . . . Future cases along the lines of Local 560 will be instituted."

This Commission's failure to help the Administration open the eyes of the Justice department careerists by examining and evaluating their record is all the more tragic in this light. The Local 560 case in fact established no new legal principles that were not established when the law was passed 16 years ago, and we have lost those years in which we could have struck many comparable blows for liberation from the gangsters' thrall for millions of Americans.

Why has the Justice Department failed to use the civil RICO weapon? Assistant Attorney General Trott was shrewdly accurate when he told the Senate Judiciary Committee: "Naturally, prosecutors prefer, and are trained, to remove organized crime influence from the business and financial communities through criminal prosecutions that result in lengthy jail sentences, stiff fines and forfeiture of criminal proceeds. Consequently, we have made very little use of civil RICO in the past."

As a professional journalist, I must add that the nation's news media must bear some of the responsibility for this dereliction. We journalists love the racket-busting criminal prosecutor. But we pay very little attention to the less glamourous civil proceedings, as witness the apathy and lack of coverage of the dramatic and pioneering Local 560 case, which broke the Provenzano Gang's hold on thousands of New Jersey Teamsters and businessmen. As the General Accounting Office has noted, news coverage is one of the "informal" indices by which the Justice Department strike forces measure their own effectiveness.

The civil RICO weapon will not come into its own until the Justice department has a corps of attorneys who are as skilled at racket-busting civilly as the strike force prosecutors are at proceeding criminally. U.S. Attorney Rudolph W. Giuliani of the Southern District of New York in February 1986 filed a civil RICO action which hints what can be done. He filed the first civil RICO action seeking to ban people altogether from engaging in a business because of their racketeering activity in that business.

The targets were a high-ranking Genovese gang member, Matthew Ianniello, and a partner, Benjamin Cohen. In a civil RICO action the government does not bear the heavy burden of "proof beyond a reasonable doubt"; it may win if it carries only a "preponderance" of the evidence burden. moreover, gangsters cannot "take the Fifth' with impunity. As Newark Strike Force Chief Robert Stewart, architect of the pioneering Local 560 case, pointed out in the Commission's April 1985 labor racketeering hearing: "Silence can be probative of deliberate concealment and can support the common-sense inference that a truthful answer would be detrimental to one's position." The judge or jurors may take silence as proof of deliberate concealment and conclude that a truthful answer would prove the government's case. in the Local 560 case, a business agent refused to answer questions about meetings with LCN gangsters -- and the judge drew the adverse inference.

IV

Here is the Justice Department's record on criminal RICO cases:

YEAR	CRIMINAL RICO PROSECUTIONS AUTHORIZED BY THE JUSTICE DEPARTMENT
1970-80	217
1981	65
1982	62
1983	102
1984	122

1985 (through May) 32

The Justice Department excuses this record by claiming that the Supreme Court in 1981 "extended the reach" of RICO and in 1983 "expanded" its forfeiture provisions. (Letter of Gerald T. McGuire, Deputy Chief, OCRS, to President's Commission on Organized Crime July 8, 1985). In fact, the justices only affirmed that Congress meant what it said in 1970 when it ordered judges to give the statute a "liberal" construction. as FBI Director William Webster said at a February 1985 press conference announcing the RICO indictment of the LCN "Commission" members in New York: "We had RICO for ten years before we knew what to do with it."

Of the Justice Department's 600 criminal RICO cases through May 1985, only 68 were brought by the strike forces, against 461 defendants. Those cases yielded $1,125,000 in fines and $3,235,000 in forfeited assets -- a scandalous pittance when measured against the vast potential. To win a criminal forfeiture a prosecutor must first obtain a grand jury indictment specifying the interest to be forfeited; a specific finding by a jury trial after a full criminal trial; and the entry of judgment by the court. The forfeiture may extend beyond property to include union offices, corporate ownership and partnership interests.

For further discussion of the many vigorous state actions under their own RICO statutes, see my supplemental statement, cited ante, and the statement of the National Association of Attorneys General and National District Attorneys Association before the House Judiciary Subcommittee on Criminal Justice, October 1985.

V

Because of this Commission's failure, the job of overseeing and evaluating the Justice Department's performance will fall where it has always rested: the General Accounting Office and the Congressional committees charged with legislative oversight. These bodies have clearly not been active or effective in the 16 years since the 1970 Organized Crime Control Act passed in inspiring and prodding the Justice Department to pursue the strategy implicit in that act.

The results of that failure are evident in the continued growth of organized crime uncovered by this Commission and in the Justice Department's shocking and almost total failure to utilize the civil litigation weapons provided by the 1970 act. The Congress needs to take a more active oversight role in the future.

November 29, 1985

For the Senate hearings on the Organized Crime Control Act (Senate Judiciary Committee hearing entitled "Measures on Organized Crime," 1969), the U.S. Justice Department prepared a chart, "Cosa Nostra Indictments and Convictions, 1960 to March 1969." This chart may also be found in the Congressional Record, August 12, 1969, page S9707. (Copy attached.)

I would like to see a comparable Justice Department study done of all prosecutions mounted under the 1970 act involving LCN members and associates and including a new category of "other" organized crime prosecutions under the 1970 act and related statutes. Such a study should include:

1. A list of defendants, by name.

2. Date and synopsis of indictment.

3. Disposition.

4. Sentence, if convicted.

5. Whether the prosecution made a Title 10 Dangerous Special Offender sentencing motion for enhanced sentence.

6. Name of sentencing judge.

7. Whether forfeiture was requested under either RICO or Continuing Criminal Enterprise statutes.

8. Was an undercover operation involved in the case investigation?

9. Was there a protected witness? Name and synopsize testimony.

10. Was an immunity grant made?

11. Was there a Title 3 tap or bug?

12. How many special grand jury reports have been filed under the act's provisions in Title 1? How many special grand juries have been convened under Title 1?

13. How many civil suits have been filed under RICO against corporations or unions or other enterprises?

14. Other dispositions -- such as referral to state?

--Eugene H. Methvin

~~alleged First Amendment violation would be affirmed.~~

~~District court judgment affirmed.~~

~~**United States ⇐60**~~

~~Judicial precedent that court was not to augment remedial system protecting federal officers by creation of new judicial remedy for federal employee who was allegedly demoted for exercising his First Amendment rights was equally applicable to former employee seeking reemployment, and where measure of administrative remedies was available and was exercised, dismissal of the former employee's action for alleged First Amendment violation was affirmed. U.S.C.A. Const.Amend. 1.~~

~~Angel & Gassaway, Steven M. Angel, San Antonio, Tex., for plaintiff-appellant.~~

~~Anthony W. Vaughn, Asst. U.S. Atty., Fort Worth, Tex., Barbara L. Herwig, Edward R. Cohen, Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C., for defendants-appellees.~~

~~Appeal from the United States District Court for the Northern District of Texas.~~

~~ON PETITION FOR REHEARING~~

~~(Opinion June 20, 1983, 5 Cir., 1983, 707 F.2d 836)~~

~~Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.~~

~~PER CURIAM:~~

~~Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for rehearing is granted. The intervening decision by the Supreme Court in *Bush v. Lucas*, —— U.S. ——, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), requires the recall of our original opinion.~~

~~In *Bush v. Lucas*, the Supreme Court declined "to authorize a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors," because the claims there presented arose out of "an employment relationship governed by comprehensive procedural and substantive provisions." *Id.*, —— U.S. at ——, 103 S.Ct. at 2406, 76 L.Ed. at 651. *Bush v. Lucas* involved an employee complaining of an adverse personnel action allegedly triggered by public statements of the employee. Administrative remedies were available and were exercised. The instant case involves a former employee who complains of mistreatment in reemployment because of union activity during the prior period of employment. A measure of administrative remedies was available and was exercised.~~

~~We cannot make a principled distinction between an employee and a former employee seeking re-employment, in the context as here presented, sufficient to base a holding that the teachings of *Bush v. Lucas* do not control. We consider *Bush v. Lucas* dispositive.~~

~~The judgment of the district court is AFFIRMED.~~

Jerry BLISS, Frank Savage, et al., Plaintiffs-Appellants,

v.

Robert F. HOLMES, Sr., President, Local 337, et al., Defendants-Appellees.

No. 83-1672.

United States Court of Appeals, Sixth Circuit.

Submitted on Motion Oct. 3, 1983.

Decided Oct. 6, 1983.

On Motion for Reconsideration Oct. 17, 1983.

Candidates for union president and vice-president positions brought action alleging that excessive publicity given to incumbent officers was an impermissible use of membership lists and union funds in violation of Labor-Management Reporting and Disclosure Act. The United States District Court for the Eastern District of Michigan, Anna Diggs Taylor, J., denied injunctive relief, and appeal was taken. The Court of Appeals held that union newsletter, distributed after incumbent union president and vice-president and their challengers announced their candidacies for offices, violated section of Act governing terms of office and election procedures as the distribution of campaign literature for the incumbents at the expense of the union, because excessive publicity in favor of incumbents was not balanced by any publicity for other candidates or even an announcement of their candidacies.

Ordered accordingly.

Keith, Circuit Judge, dissented from order denying motion for reconsideration.

1. Labor Relations ⇐123

Under Labor-Management Reporting and Disclosure Act, once a member's candidacy is announced, if union uses union mailing list to mail a newsletter the newsletter must refrain from discrimination in favor of or against any candidate. Labor-Management Reporting and Disclosure Act of 1959, § 401(c, g), 29 U.S.C.A. § 481(c, g).

2. Labor Relations ⇐123

Union newsletter, distributed after incumbent union president and vice-president and their challengers announced their candidacies for offices, violated section of Labor-Management Reporting and Disclosure Act governing terms of office and election procedures as the distribution of campaign literature for the incumbents at the expense of the union, because excessive publicity in favor of incumbents was not balanced by any publicity for other candidates or even an announcement of their candidacies. Labor-Management Reporting and Disclosure Act of 1959, § 401(c, g), 29 U.S.C.A. § 481(c, g).

Barbara Harvey (argued), Detroit, Mich., for plaintiffs-appellants.

Jerome S. Coleman, Coleman, Lipson & Bradford, Farmington Hills, Mich., Gerry M. Miller (argued), Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, Milwaukee, Wis., for defendants-appellees.

Before KEITH, KENNEDY and CONTIE, Circuit Judges.

PER CURIAM.

Plaintiff Bliss is a candidate for office of president of defendant Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Plaintiff Savage is a candidate for vice president. They allege that the excessive publicity given to Robert F. Holmes and Lawrence Brennan, incumbent president and vice president of Local 337, in the union newsletter, "TEAM 337", is an impermissible use of the membership lists and union funds by defendants in violation of 29 U.S.C. § 481(c) and § 481(g).

Plaintiffs sought an injunction against use of the newsletter as campaign literature for the incumbents while denying them reasonable mention.

The District Court found nothing unusual in the union newsletter devoting the bulk of its attention to incumbent officers. It also held that plaintiffs could obtain adequate relief in the post-election remedy of having the election set aside. Concerned with avoiding entanglement in union affairs and interfering with the local union's first amendment rights, it denied injunctive relief.

We share the District Court's first amendment concerns as well as its concern that the courts refrain from involving themselves in internal union controversies when possible. However, Congress adopted § 481(c) and (g) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(c) ("LMRDA"), to maintain democratic and fair conduct in election of union officials and expressly gave the right to enforce LMRDA guarantees in the federal courts.

§ 481. Terms of office and election procedures

(c) Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this subchapter. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

[1] Once a member's candidacy is announced, if the union uses the union mailing lists to mail a newsletter the newsletter must refrain from discrimination in favor of or against any candidate. A "[n]ewsletter laudatory of the incumbent President and derogatory of his opponent paid for by the Union and distributed from its mailing list was prohibited campaign literature in violation of Section 481(g). See *Hodgson v. Liquor Salesmen's Union Local No. 2,* 334 F.Supp. 1369, 1377 (S.D.N.Y.), *aff'd,* 444 F.2d 1344 (2 Cir.1971); *Wirtz v. Independent Workers Union of Florida,* 272 F.Supp. 31 (M.D.Fla.1967)." *Usery v. International Organization of Masters, etc.,* 538 F.2d 946, 949 (2d Cir.1976).

[2] After plaintiff Bliss announced his candidacy for president of Local 337 in May 1983 and incumbent president, Holmes, announced his intention to run for re-election in the May, 1983 issue of "TEAM 337", the union was required to refrain from discrimination in favor of or against any candidate. The publication is paid for by the union and uses the union's membership lists for distribution. Our review of the May, June, July, and September issues of "TEAM 337"[1] discloses numerous pages devoted to laudatory articles about the incumbent president and numerous columns by both the incumbent president and vice president, the effect of which is to advance their candidacies. No mention is made of plaintiffs Bliss or Savage, except their inclusion in the masthead as secretary-treasurer and trustee. The September issue, which was not available to the District Court, devotes 3 out of a total of 7 pages to President Holmes and Vice President Brennan. We conclude that this excessive publicity, not balanced by any publicity for other candidates, or even an

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[1] We were not provided with a copy of an August, 1983 issue.

announcement of their candidacies, constitutes the distribution of campaign literature for defendants Holmes and Brennan distributed at the expense of the defendant union. *Sheldon v. O'Callaghan,* 335 F.Supp. 325, 327–28 (S.D.N.Y.1971).

Plaintiffs are entitled, therefore, to have a piece of their campaign literature distributed in a similar manner, *i.e.,* at union expense. We, therefore, order that defendant union pay for the mailing of a piece of campaign literature prepared by plaintiffs to be mailed at the same time the September, 1983 newsletter is mailed. The preparation of the literature itself, including folding, if that is necessary for using the union's mailing process, shall be paid for by plaintiffs. Defendant union is required only to pay for the mailing which shall be mailed in the same manner as is the newsletter.

Defendants are further ordered to refrain from discrimination in any further newsletters distributed before the November 1983 election which are prepared and mailed at union expense and use union membership lists. *Yablonski v. United Mine Workers of America,* 305 F.Supp. 868 (D.D.C.1969).

On Motion For Reconsideration

This cause comes before the Court upon the motion of the appellees for a stay and reconsideration of the Court's order of October 6, 1983, requiring appellee Local 337 to mail appellants' campaign literature to the membership, at the Local Union's expense. The appellants have filed a response in opposition to the motion, and oral argument was held on October 13, 1983.

Upon consideration, it is ORDERED that the motion to reconsider the October 6, 1983 order be, and it hereby is, denied. It is further ORDERED that the interim stay of that order is hereby vacated.

KEITH, Circuit Judge, dissenting:

I respectfully dissent. I am convinced after hearing oral arguments in this case that the Teamsters' newsletter, "337", for the months in question, does not contain excessive publicity for President Robert F. Holmes, Vice-President Lawrence Brennan and Richard Leebove. I therefore would vacate the preliminary injunction for the stay heretofore entered on October 6, 1983, and allow defendants-appellees to proceed with the distribution of all election materials. Our Court's decision to grant the stay in this case will have a chilling effect on the First Amendment rights of the officers of Local 337. I feel very strongly that courts should not interfere with the internal operations and politics of unions.

[redacted]

Senator NICKLES. Mr. Methvin, I thank you very much.

To all of our witnesses today, we appreciate your cooperation and we will keep the record open for a couple of weeks for additional comments or questions.

[Additional statements submitted for the record follow:]

STATEMENT
OF
THE ARMORED TRANSPORTATION INSTITUTE
ON
S. 1018
SUBCOMMITTEE ON LABOR
OF THE
UNITED STATES SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES

My name is James L. Dunbar. I am Chief Executive Officer of Federal Armored Express, Inc. and represent the Armored Transportation Institute, of which my company is a member, and of which I am Chairman.

The Armored Transportation Institute is an education and information oriented association, composed primarily of small, privately owned armored car companies. The Institute attempts to keep our member companies abreast of new developments in our industry, such as technological innovations, improvements in operational procedures, training of personnel, and legislative actions affecting our industry. We also keep our members informed of the latest tactics and methods employed by terrorists, armed criminals and other underworld threats to our industry. Since our members are primarily small companies serving local communities throughout the country, the information services provided by the Armored Transportation Institute represent an important source of management and anti-crime expertise to our members.

Our member companies provide a unique and vital service to the commercial life of our nation, since we provide the protective and custodial transportation functions which are necessary for the safe, secure movement of large amounts of currency and coin, negotiable instruments and other items of unusual value. Our customers include every kind of enterprise, large and small, throughout the business and banking communities. These include retail and wholesale establishments, manufacturers, financial institutions (including the Federal Reserve System), government (civil and military), service companies and others who entrust to our employees their coin, currency, payrolls, commercial papers and other related valuables, upon whose secure movement they are critically dependent.

As small, independent businessmen, the members of our association have expressed deep concern regarding S. 1018. It is our feeling - as supported by a long history NLRB and court decisions - that the historical interpretation of Section 9(b)(3) of the National Labor Relations Act is correct, and that it accurately reflects the original intent of Congress with regard to the armored car industry.

Section 9(b)(3) provides that persons employed as guards may not be included by the National Labor Relations Board in any bargaining unit containing non-guard employees. It further provides that no labor union may be certified by the Board as the bargaining representative of a unit of guards if such organization admits non-guard employees into membership, or is affiliated directly or indirectly with an organization which admits non-guard employees into membership. "Guards," for this purpose, are defined as individuals employed to enforce rules to protect property of the employer or to protect the safety of persons on the employer's premises. The obvious and oft-stated premise of this provision is that employers are entitled to, and must have, the undivided loyalty of those persons who are responsible for maintaining order and protecting the employer's property.

In numerous decisions since 1953 (Armored Motor Service Company, Inc. 106 N.L.R.B. 1139), the NLRB has consistently ruled that armored car guards fall legitimately within the original Congressional definition of "guards" in Section 9(b)(3). As such, the "undivided loyalty" premise, as stated above, forms the cornerstone of our opposition to S. 1018. Given the fact that armored car guards are usually entrusted with the safekeeping of property and valuables far in excess of that entrusted to narrowly defined "plant guards;" and given the fact that by the nature of the armored transportation business, armored car guards must encounter far more opportunities for potential conflicts of interest with other unions than stationary "plant guards," it would seem obvious that the rationale for Section 9(b)(3) applies to armored car guards to a greater extent than it does to the "plant guards" that S. 1018 purports to defend. In short, armored car guards merit the most protection from circumstances with the potential for divided loyalty because they are most subject to the possibility of encountering such situations.

The "divided loyalty" premise has been firmly established over a period of more than 40 years, and has been well described by other representatives of the armored car industry in the course of these hearings. For these reasons, the Armored Transportation Institute would like to describe other important aspects of Section 9(b)(3)'s historical application, from the experience of my own company, Federal Armored Express, Inc. (Dunbar Armored Express, Inc., 211 N.L.R.B. 687).

Federal Armored Express, of which I am the founder, has grown from a small, Baltimore-based carrier to a national company. We service retail and financial customers of all sizes - including the Federal Reserve - both in large metropolitan areas and in small rural communities. In the course of my career I have experienced numerous situations and problems that I feel are unique to the armored car industry, due to the nature of our cargoes and our vital position in the nation's economy.

S. 1018 purports to narrow the definition of "guards" within Section 9(b)(3) to include only "plant guards," on the contention that this definition represents the original intent of Congress. In 1974, my company sought and received a definitive ruling on this issue from the National Labor Relations Board, due to a situation arising from illegal picketing at our Riverdale, Maryland branch by Local 639 of Drivers, Chauffeurs and Helpers - an affiliate of the International Brotherhood of Teamsters.

In the course of the hearing, Local 639 argued four basic points, all of which apply to the issues raised by S. 1018. The union contended that:

1.) "...the service provided by Dunbar is no different than that of a regular trucking operation, and that Dunbar's drivers and 'hoppers' are merely 'truckdrivers with guns'"

2.) "...any potential conflict of interest that might occur if a customer of Dunbar was struck by a Teamsters local could be dealt with by a clause requiring Dunbar's employees to cross picket lines when necessary."

3.) "...continued adherence to that precedent effectively disenfranchises a significant number of employees in the absence of express Congressional intent."

4.) "...the prohibition within Section 9(b)(3) of the Act runs only to plant guards, rather than to individuals who perform functions similar to those involved in the instant case."

The National Labor Relations Board rejected all four arguments, in the following clear definitive language:

> "We are not persuaded by these arguments.
>
> Dunbar's operations are significantly different from that of a regular trucking operation, and it is a facile oversimplification to argue that the employees sought by the Respondent are merely 'truck-drivers with guns'...Furthermore, the fact that the employees sought are primarily charged with the protection of property of Dunbar's customers, rather than Dunbar's own property, makes no difference. In performing their primary duties, they must protect property entrusted to Dunbar as well as to protect Dunbar's armored trucks and vault. Certainly, our decisions as well as court decisions have adhered to the principle that it makes no difference that the property to be protected is that of a customer of the employer rather than that of the employer."

The NLRB also addressed the issue of armored car guards' collective bargaining rights, as resurrected by S. 1018:

> "Lastly, although these employees cannot be represented by a union which represents nonguard employees, they can choose a representative that exclusively represents guard employees, and thus obtain representation by a labor organization which fulfills the statutory requirements for certification under Section 9(b)(3). In sum, we conclude that the employees sought by the Respondent are guards."

We have limited our remarks to extensive quotations from this NLRB decision for several reasons. First, to demonstrate that every issue raised by S. 1018 and its proponents has already been thoroughly discussed, analyzed, and decided upon by the NLRB and the courts repeatedly since 1947. Second, to demonstrate that the inclusion of armored car guards within the definition of "guards" under Section 9(b)(3) has not been seriously questioned since 1974, when the issue was settled definitively. And third, to demonstrate the true nature of the controversy surrounding Section 9(b)(3) at the present time.

The Armored Transportation Institute contends that all of the issues and arguments raised by proponents of S. 1018 are bogus. In fact, S. 1018 is a glaring example of legislative favoritism on behalf of a narrow, but powerful, interest group. That interest group is the International Brotherhood of Teamsters, who would be the sole beneficiary of the bill.

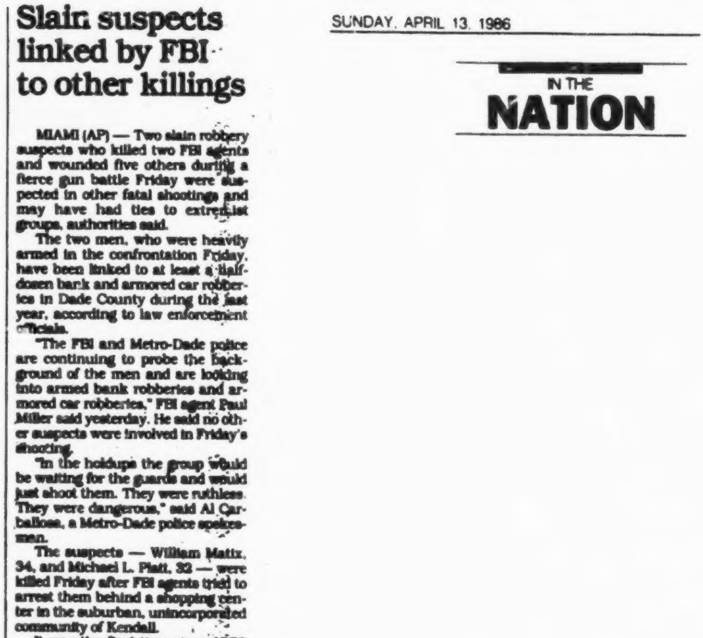
The armored car operators would not benefit. In fact, our members feel strongly that the welfare of our businesses would be seriously jeopardized by the bill's passage.

The armored car guards would not benefit. Those guards who wish to join a union for purposes of collective bargaining are already perfectly free to do so - so long as the union qualifies under the guidelines of Section 9(b)(3). Such unions do exist, with thousands of guard members nationwide.

The existing guard unions would benefit least of all. Passage of S. 1018 would unquestionably threaten the continued existence of these unions, who have worked for the welfare of their members over the past 40 years.

The armored car industry is not anti-union, and the 9(b)(3) issue should not be viewed in terms of closed shops versus open shops. The present controversy should be viewed in terms of one union's interests versus the interests of legitimate guard unions, armored car operators and their customers, and ultimately the welfare of the national economy.

It is our contention that all of the issues raised by S. 1018 have been examined and ruled upon definitively and consistently by the National Labor Relations Board numerous times since 1947. We contend that the National Labor Relations Board has ruled correctly and in good faith with the original intent of Congress - for good reasons. We urge you to retain Section 9(b)(3) as it has historically been defined, and reject the proposed amendment.



SUNDAY, APRIL 13, 1986

IN THE
NATION

Slain suspects linked by FBI to other killings

MIAMI (AP) — Two slain robbery suspects who killed two FBI agents and wounded five others during a fierce gun battle Friday were suspected in other fatal shootings and may have had ties to extremist groups, authorities said.

The two men, who were heavily armed in the confrontation Friday, have been linked to at least a half-dozen bank and armored car robberies in Dade County during the last year, according to law enforcement officials.

"The FBI and Metro-Dade police are continuing to probe the background of the men and are looking into armed bank robberies and armored car robberies," FBI agent Paul Miller said yesterday. He said no other suspects were involved in Friday's shooting.

"In the holdups the group would be waiting for the guards and would just shoot them. They were ruthless. They were dangerous," said Al Carballosa, a Metro-Dade police spokesman.

The suspects — William Matix, 34, and Michael L. Platt, 32 — were killed Friday after FBI agents tried to arrest them behind a shopping center in the suburban, unincorporated community of Kendall.

It was the first time since 1979 that two FBI agents had been killed in one incident. More casualties were incurred than in any other single action in the agency's 78-year history.

The FBI identified the slain agents as Benjamin T. Grogan, 53, a 25-year veteran, and Jerry Dove, 30, an agent since 1982.

The suspects' behavior, their use of automatic .223-caliber weapons and fatigue clothes, similar to those worn by survivalists, suggest ties to extremist groups, yesterday's editions of *The Miami Herald* quoted an unidentified FBI agent in Washington as saying.

"They did not shoot out of fear or excitement. It was cold; it was calculated," the agent said.

Metro-Dade Sgt. Tony Monheim said, "They really sound like survivalists . . . They are very clean-cut, definitely Americans.

"In all these robberies it's all automatic weapons, shotguns, heavy, heavy armament, suggesting a possible connection to such extremist groups."

Neither Mr. Matix nor Mr. Platt had ever been arrested, police said.

Senator Nickles. Thank you very much.

[Whereupon, at 12:10 p.m., the subcommittee adjourned.]